[redacted]

FILED

[redacted]

In the Supreme Court
of the
United States

[redacted]

No. 1304

[redacted]

[redacted]

vs.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

INDEX

PETITION 1

OPINION 1

JURISDICTION 2

QUESTIONS PRESENTED 2

FEDERAL STATUTES INVOLVED 3

FEDERAL COURT JURISDICTION 4

STATMENT OF FACTS 4

REASONS FOR GRANTING THE WRIT 11

I. Order Staying the Proceedings Prohibited the Plaintiffs Taking Further Steps in This Action. Unsuccessful motions were made to modify the stay and proceed with the action. A dismissal for want of diligence and prosecution is not justified. 11

II. The Court should not grant summary judgment to arbitrate on conflicting affidavits. 14

III. The contract 18

IV. A party is not required to submit his dispute for decision to his adversaries 23

V. Duty to arbitrate 28

VI. Collective bargaining agreement discrimination and hostile acts in bad faith by statutory collective bargaining agent. 29

CONCLUSIONS 35

APPENDIX 39

TABLE OF AUTHORITIES CITED

Page

American Locomotive Co. v. Gyro Process Co., 105 F 2d 319 10

Calif. Fruit & A C Assoc. v. Cato, Assoc. Can Co. 69 F 2d 703 14

Coleman v. Superior Court, 138 CA 74 11

Drake Bakeries Ltd. v. Local 24, 370 US 254 ..... 17, 23

Dudley v. Comm. Pub. Service Co. 103 F 2d 119 11

Edwards v. Capital Airlines 178 F 2d 794 23

Elgin J. E. R. Co. v. Burley (1945) 325 US 711 27

Fiore v. Associated Transport Inc. 233 Fed Supp 899 23

Goebel-Seaford, Inc. v. United Textile Workers 333 U. S. 330 12

Hess Engr. & T. Co. v. Assoc. Indep. Oil 230 F 2d 349 10

Heller v. Liquor Salesmen Union Local 2 335 Fed 2d 779 34

Humphrey v. Moore, 375 US 335 35

Kypuk Co. v. Hammann & Co. 230 F 207 11

Lane Ltd. v. Lanes Bros., 243 F 2d 291 17

Lemmis v. Commonwealth Refining Co. 105 F Supp 572 10

Newton Investigation Bureau, 60 NLRB 157 23

Phoenix Thrower Co., Inc., 109 NLRB 233 23

Procter & Gamble Indep. Union v. Procter Gamble Mfg. Co., 312 F 2d 181 10

Rubber Specialty Co. v. Comm. Mfrs 97 F 2d 319 17

Red Cross Line v. Atlantic Fruit Co., 264 US 109 15

TABLE OF AUTHORITIES CITED

Page

Richardson v. Ten. & New Orleans R. Co.
242 Fed 2d 330 32

Ross v. Twentieth Century Fox Film Corp.
220 F 2d 652 12

Standard Magnesium Corp. v. Peebo, 222 F 2d 425 13

Steele v. Louisville & N.R. Co. 323 U. S. 192 25

Tribowitch v. Riverbank Canning Co.,
30 C 2d 305 14

U. S. v. Fischer, 93 F 2d 653 11

U. S. Steel Works v. Warrior & Gulf
363 U.S. 574 ..... 10, 28

Vaca v. Sipes, 386 U.S. 171 ..... 31, 34, 35

Wilson v. Republic Iron Co., 257 U.S. 92 11

Zeckler v. Newmann, 214 N.Y. Supp. 2d 31 11

211 Fed 2d 643 31

STATUTES

	Page
CCP 1102	14
CCP 1281	15
Federal Arbitration Act, 9 USCA 8	15, 16
Lanham-Griffin Act, Sec. 504 (60 USCA 414)	10
8 Amer. Jur. 2d 979	15

In the Supreme Court

of the

United States

OCTOBER TERM, 1970

NO.

FRED A. ALEXANDER, et al.,

Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The above named petitioners Fred A. Alexander, Louis D. Camarota, George Cathro, Albert S. Diamond, Louis Freeman, Frank Marumi, Ray C. Marvin, James Newell, and Earl D. Peterson, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth District entered in the above-entitled case on November 9, 1970.

OPINION

The opinion of the Court of Appeals for the Ninth Circuit is reported at 432F 2d.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on November 9, 1970, and copies thereof are appended to this petition. (Appendix). Jurisdiction of this Court is invoked under 28 USCA 1254 (1).

THE QUESTIONS PRESENTED ARE:

1. May a District Court stay a legal action not at issue and while the stay is in effect, dismiss the action for failure to file a memorandum to set (lack of prosecution) because the stay if observed?

2. May a non-union workman be required to arbitrate a dispute with the employers association and the union and their joint port committee for breach of the collective bargaining agreement?

   a. Where there is no disclosed contract requiring arbitration as an exclusive remedy?

   b. Must a collective bargaining contract to arbitrate be in writing?

   c. Can breaches arising from hostile discrimination because of the non-union status (admission to fully back membership denied to the workman arbitrarily to give special privileges and benefits to full book members of the union), be required to be determined in a grievance arbitration machinery by his adversaries?

d. Can the collective bargaining contract to arbitrate be oral and in the process of trying to be agreed upon and not yet reduced to agreeable wording?

e. Can such arbitration be forced by stay of Section 301 action where the terms of the contract are in dispute and there are conflicting affidavits thereto, and without trial of the issues.

f. Can arbitration be required without a finding of the alleged contract to arbitrate (in dispute) and without finding of the issues to be arbitrated?

g. Can the defendants employer association and union on January 31, 1963 agree to a procedure requiring submission of their non-union workingmen discrimination to themselves for arbitration and final decision and make this retroactive to plaintiff's suit brought in August 1962?

FEDERAL STATUTES INVOLVED

This case involves Sec. 301 of the National Federal Labor Relations Act, 29 USCA 185 (Breach of the Collective Bargaining Agreement), 28 USCA 1337 (Commerce), 29 USCA 186 (jointly Trusteed for Benefit of Employees). The collective bargaining agreement involves construction and validity of portions under 29 USCA 401 et seq., 402 and 414 (Labor and Management Disclosure Act) and 29 USCA 151 et seq., 158 (National Labor Relations Act).

FEDERAL COURT JURISDICTION

The action is one for hostile discrimination against the plaintiffs as non-union shipclerks for breaches of the disclosed written collective bargaining agreement arising out of this hostile discrimination in this Section 301 action under the N.L.R. Act.

STATEMENT OF FACTS

The above-entitled action was commenced by the filing of the original complaint and issue of summons on August 13, 1962. Interrogatories by the plaintiffs to the PMA were served and filed October 1, 1962 (R-16). A motion to dismiss the action was granted on November 1, 1962 (R-70), the matter taken on appeal and the dismissal reversed by the 9th Circuit Court of Appeal, 314 Fed 2d 690. An amended complaint was filed April 12, 1962 (R-89-122).

A motion was noticed for May 20, 1962 for summary judgment and for stay, etc. (R-128) based upon the affidavit of ROBERTSON accompaying the motion. In opposition, affidavits were filed (R-75) of plaintiffs' counsel setting forth the written collective bargaining agreement and that portions of the purported agreement quoted in the ROBERTSON affidavit were actually from the Longshore Agreement which is not applicable to shipclerks who have their separate agreement. The affidavit for plaintiffs shows the inquiry made by plaintiffs' counsel wherein the written agreements were disclosed by PMA and the Union; it sets forth steps taken by a shipclerk under Section 104 of the Landrum-Griffin Act (29 USCA 441) to inspect the shipclerk's collective bargaining agreement and

that it was generally the writings disclosed by the inquiry made by counsel. An affidavit (R-178) sets forth the estoppel to contend the agreement is different from that disclosed under the Landrum-Griffin Act 29 USCA 441. The affidavits set forth the substance of the deposition taken by the plaintiffs of PAUL ST. SURE, President of PMA, that the Clerks Master Agreement of 1952 and some twenty subsequent written amendments, etc. were being re-drafted along with various oral agreements and practices intending to use much of the Longshore Agreement in the clerk's collective bargaining agreement; parts were oral and parts were proceedings before the various committees of PMA and the ILWU but the language and the exact terms were in the long process of being reduced to agreeable language and that only a draft had been submitted to the union.

The affidavit (R-178) sets forth that on June 26, 1962, plaintiffs' counsel wrote the union, the hiring hall, the joint committee that runs the hiring hall and various trustees of the various funds, stating:

> "As in that prior action, I have examined the joint bargaining agreement, and I can find no provisions for arbitration machinery for disputes involving either matters of registration or dispatch. If you know of any such mechanics or terms in the collective bargaining agreements as to arbitration covering these matters, I would welcome the mechanics of arbitration to solve these disputes or any phase of them on behalf of my clients."

At R-179 the affidavit states that none of the defendants or their counsel responded to this request and after a month and a half on August 13, 1962 filed the above action. Having refused to arbitrate and having required plaintiffs to resort to judicial remedy, the defendants cannot, nine months later, ask to stay these proceedings which they required to be commenced for failure to respond or arbitrate and that if there were any mandatory requirements for arbitration, it had been waived by this long delay. At R-180 is Sec 21 of the Clerk's Master Agreement of April 14, 1952, the "grievance machinery" of this contract.

It is not a mandatory arbitration provision and it is drafted to prohibit the non-union plaintiff shipclerks as a part of the planned, hostile discrimination against them, from having any remedy on pay, registration or dispatch from the hiring hall. It specifically restricts, any arbitration to the contract as written. The affidavit also shows the attempt of a certain ROPER, also a non-union shipclerk, to obtain arbitration which was refused because ROPER was a non-registered non-union shipclerk. The affidavit of MARVIN, (R-187) a non-union shipclerk plaintiff is that the shipclerk's collective bargaining agreement is the written instruments set forth in the amended complaint; that the affidavit of ROBERTSON quotes from the Longshore Agreement which is no part of the shipclerks agreement; it states that he as a plaintiff is entitled to jury trial on the factual issue as to what is the contract and its contents. It sets forth the demand made by his counsel prior to the litigation as to any mechanics or provision for arbitration and the refusal of the Union, PMA and their counsel, the Joint Port Committee or any of the

trustees to respond to the request. It was this refusal to even respond that necessitated the action at law.

Interrogatories were submitted and re-submitted to the defendants, much of which was addressed to the contents of and the evidence of the collective bargaining agreement. The District Judge made an order directing these answers, and no answer have been given, motion was made to impose sanctions.

Another District Judge on July 19, 1963 entered his order denying the motion for sanctions and summarily staying all proceedings upon the action at law. This order of July 19, 1963 is set forth in an appendix to the petition.

It should be noted that there were no findings as to what the contract was, that required arbitration or what the issues were to be arbitrated, and although there were issues raised by the affidavits no trial was held upon them as requested.

That order of July 19, 1963 was appealed to the Ninth Circuit Court of Appeals and held not to be an appealable order in 332 Fed. 2d 266 and the petition to the Supreme Court for Certiorari was denied.

The plaintiffs tried in good faith to fully exhaust the claimed grievance procedure reserving in each step their objections and stating it was taken without prejudice to their position. These steps appear in the record on the various motions made by the plaintiffs to set aside the stay and proceed with the action at law. The District Court refused to vacate the stay or to modify it and the stay was in full force and effect when the action was dismissed because the plaintiffs

obeyed that stay order on the grounds that no memorandum to set the cause for trial had been filed, notwithstanding the case was not at issue.

The record is full of the difficulties faced by counsel trying to follow a claimed grievance-arbitration procedure not in writing and which changed with the will of the defendants as appears in the record. The plaintiffs were met at every turn with the contention that some of the issues had gone to one level and others had gone to another level or that the plaintiffs had not acted timely. See R-239 involving attempt to file a grievance before the two defendants and their joint committee, the delays occasioned, the attempt to take it to the next higher step in the procedure when there is a delay (see R-294-8).

On April 5, 1965 plaintiffs noticed a motion to modify the stay so the case could proceed on its merits and supported it with the affidavit setting forth the various steps, procedures, etc. (R-310) sets forth the attempt to go to the Coast Committee and the refusal of the Coast Committee to even hear the matter, sending it back to the Port Committee (both being committees composed of the defendant Union and the PMA). When appearing before the Joint Port Committee again, various records particularly as to admission to membership in the union together with the "registration" of these full book members and their date, were requested as registration was restricted by the unions veto to only its own full book members. Affidavits on both sides appear in the record of this motion. See KUCIN affidavit (R-393) with various exhibits for the PMA. See plaintiffs' counsel's affidavit (R-408)

filed April 19, 1965 with various correspondence, records, etc. That affidavit (R-410-424) quotes at length the material parts of the ST. SURE deposition where ST. SURE was asked about a certain "Longshore and Clerks Agreement" appearing in the Class B application form and the PMA president replied that that was the agreement in the course of preparation and the wording had not been agreed upon. It shows that as of June 22, 1962, six weeks before this suit was filed, that there was a written memorandum between the unions and PMA that there were changes made in each of the two separate agreements, one for Longshore and one for Clerks. The record (R-417) showed by ST. SURE'S testimony that awards of arbitration are not final but are subject to modification by agreement between the defendants. It (R-422-3) shows that on January 31, 1963, some six months after this suit was filed, the written addendum upon which the plaintiffs claimed a duty to arbitrate because of union discrimination against non-union employees was enacted and that this particular litigation might have had some bearing on the defendants making that addendum.

Actually, the first step in the grievance procedure was the unanimous action of the Joint Port Committee by its Union members and PMA members, which by the terms of the disclosed written agreement and by Mr. ST. SURE'S deposition had the effect of ending any further steps under the grievance-arbitration machinery. Indeed, the record shows the quandry in which the plaintiff's counsel found himself, along with PMA counsel and the Union's counsel as to what, if any, remedy appeared under that vague, indefinite, oral

collective bargaining agreement that changed to suit the particular needs of the moment of the defendants' unions and the PMA.

Plaintiff's counsel again made a motion on June 20, 1968 for a modification of the stay order to require the defendants to answer the interrogatories, and to require the defendants to plead to the amended complaint. This motion was supported by affidavits showing that THOMAS, the area arbitrator appointed by the defendants, refused to act. Counter affidavits were filed and again that motion was denied (R-868).

A third motion was filed in the District Court in May of 1968. (R-858, R-863). At the suggestion of the District Court Judge, plaintiffs re-noticed the motion as one to unstay the action (R-933). In the meantime the case came up on the Rule 11 calendar, and plaintiffs' counsel filed his certificate, as required by the local rules (R-868) and on June 5, 1968 it came before another District Judge and although the stay was still in effect the order of dismissal was made (R-936) and the appeal taken.

The action is under Section 301 (29 USCA 186) of the National Labor Relations Act and the amended complaint is set forth in a supplement to this petition and will not be repeated here.

REASONS FOR GRANTING THE WRIT

I

THE ORDER STAYING THE PROCEEDINGS PENDENTE THE PLAINTIFF'S FILING CERTAIN PAPERS IN THE ACTION, UNCONDITIONAL, REFUSED WERE SUBJECT TO MODIFY THE STAY AND TO PROCEED WITH THE ACTION. A DISMISSAL FOR WANT OF DILIGENCE AND PROSECUTION IS NOT JUSTIFIED.

A dismissal of an action is an appealable order.

Wilson v. Republic Iron Co. 257 US 92, 42 S.Ct. 35

Dudley v. Community Pub. Serv. Co. 5 CIR '40, 108 Fed 2d 119

There is no question a court has inherent power to dismiss an action for want of diligence in its prosecution although the statute of limitations will bar another suit or though the dismissal is a plea at bar.

Dismissal for lack of diligence of prosecution is addressed to the sound discretion of the trial court.

U.S. v. Fischer 2 Cir '37, 93 F 2d 493.

However, as in the case at bar, where the cation is stayed by the court's order, there was no grounds to dismiss the action.

Kyptok Co. v. Hennemann & Co., (D.C.P.) 216 F 267

Coleman v. Sup. Ct. 135 CA 74, 26 P 2d 673

Zoellner v. Newmann 214 N.Y. Supp 2d 31, 13 A.D. 2d 723

The case was prosecuted with diligence. It has been to the Appellate Court twice, the second involving the stay order of July 19, 1963, in which this court held it

was not an applicable order, although plaintiffs' counsel believed that *Goodall-Sanford, Inc. v. United Textile Workers* 353 *U.S.*, 550, 77 Sup.Ct. 920, clearly held an order requiring arbitration in a Section 301 action an appealable order. See also *Ross v. Twentieth Century Fox Film Corporation* 9 *Cir* 156, 256 F 2d 632, 633.

Motions to modify the stay and to proceed with the case were denied by the District Court.

It would be indeed a strange rule that in an action for damages and for a writ of mandate to require the defendant Port Committee to register the plaintiffs' names as ship's clerks under the collective bargaining agreement, a Section 301 action, that the court may stay proceedings without any trial of the issues of fact as to what if any provisions there are or were in the collective bargaining agreement claimed to make arbitration the exclusive remedy and without determining what these issues are or what must be tried under the terms of the collective bargaining agreement, this same court may dismiss the action for want of prosecution during the stay. There was no lack of diligence or work on behalf of the plaintiffs or their counsel at any stage of these proceedings. There were constant questions of what this vague, indefinite and changing procedure was and indeed what issues went where, or who could or would hear what matter and when.

It is a strange rule established by the appellate decision sought to be reviewed that the District Court may stay a proceeding and then contend that because the stay order is observed the plaintiffs are guilty of negligence and failure to prosecute the action stayed and it may be dismissed. It is not possible for the District Court to hold the plaintiffs by one hand staying

all proceedings in the action at law, and by the other hand strike down the plaintiffs because they are laid.

We have here the appellees contending that there is but a second step before the area arbitrator in a long procedure of grievance-arbitration which the plaintiffs have sought to follow in good faith only to be frustrated, delayed and prevented from exhausting that purported remedy simply because that second step of that long series has been taken and the plaintiffs did not act timely, in the vague, indefinite and changing procedure of the grievance-arbitration contended for by the defendants. There is a stay without so much as a finding as to which of the claimed contracts apply, the disclosed written contract under which men are dispatched and paid and which prohibits arbitration to non-union, non-registered ship clerks, or the oral, indefinite, changing and not yet agreed upon wording of a collective bargaining agreement contended for by the union and employers. It should be noted that the area arbitrator, THOMAS, did not purport to act in this second step requiring the area arbitrator's hearing, but another person, a ringer, was brought forth by the defendants who is admittedly not the area arbitrator and yet the award of this stranger brought forth by the defendant union and the defendant PMA is dignified by the appellate decision as an award in arbitration, notwithstanding there were other steps in the arbitration-grievance procedure contended for by even the defendants from their vague, oral, changing agreement.

It should be noted that that unauthorized substitute who purported to make an award did so not in accordance with the custom and practice of the defendants in

their own arbitration and disputes between them in the same area which were being heard and decided by Mr. THOMAS as area arbitrator, but this was to hear a matter in dispute arising from hostile discrimination by both the union and the employers association against the plaintiffs because they were non-union, non-registered ship clerks and made the subject of contract breaches because of their non-union status, and were made second class citizens.

This being an appealable judgment of dismissal, the validity of the order of July 19, 1963 is directly presented to this court for review.

II

THE COURT SHOULD NOT GRANT SUMMARY JUDGMENT TO ARBITRATE ON CONFLICTING AFFIDAVITS.

The defendant PMA noticed a motion seeking to dismiss the complaint, and for summary judgment for stay pending arbitration. A stay pending arbitration is specific performance of the alleged contract to arbitrate. A proceedings under the statute to require arbitration, although in the form of a special proceedings, is in substance a suit in equity for specific performance of the contract to arbitration requiring findings like any other determination in equity.

Trubowitch v. Riverbank Canning Co., 30 Cal 2d 335, 192 P 2d 182 at 190.

California Prune & Apricot Growers Assoc. v. Cats American Can Co., 60 F 2d 788, referred to arbitration under the California arbitration statute, CCP 1182:

"... and this is in the nature of an equity suit in that it seeks specific performance."

Red Cross Line v. Atlantic Fruit Co., 264 US 109, referring to the N.Y. arbitration statute:

"... the purpose of the statute was to make specific performance compellable."

5 Am. Jur. 2d, 578, Arbitration and Award 78, refers to proceedings to enforce arbitration as "specific performance" of the contract to arbitrate.

Standard Magnesium Corp. v. Fuchs, 10 Cir., 251 F 2d 455, referred to the Federal Arbitration Act, Section 4, as a summary remedy in the nature of specific performance.

In the case at bar, the District Court in the order of July 19, 1963 upon conflicting affidavits, ordered the action stayed pending arbitration. It made no findings. It made no indication or direction as to what such proceedings to arbitrate are, as must be in any decree of specific performance. It is no remedy for the plaintiffs to be required to arbitrate under some unknown, indefinite, and secret oral contract, and at every turn they must guess as to what step to take and to be told they have acted improperly or untimely. Under the *Federal Arbitration Act*, 9 USCA 2, a contract to arbitrate must be in writing. Under the California statute, CCP 1281, a contract to arbitrate must be in writing.

A summary judgment to arbitrate should not be granted where there are conflicting affidavits as to the contract.

***Procter & Gamble Indep. Union v. Procter & Gamble Mfg. Co.*, 2 Cir. 1962, 312 F 2d 181.**

Where it is contended there is a contract involving an agreement to arbitrate, and there is conditional acceptance in issue on conflicting affidavits, as to whether the condition was performed or not, and whether the contract thus existed, it is a matter to be tried by the court as other cases are tried, not on conflicting affidavits.

***L. Haas Engr. & T. Co. v. Amer. Indep. Oil Co.*, 2 Cir., 289 F 2d 346.**

There must not only be no issue as to the making of a valid contract including an agreement to arbitrate, but there can be no waiver of the right to arbitrate. Waiver can arise from the active participation or pleading in a lawsuit without immediately taking steps for arbitration.

***American Locomotive Co. v. Gyro Process Co.*, 185 F 2d 316**

Whether there is a valid contract requiring arbitration or not is an issue of fact to be tried by the court or by a jury, unless a jury is waived.

***Lummus v. Commonwealth Refining Co.*, DC-NY 1961, 195 Fed Supp 572.**

Arbitration is a matter of contract, and a party cannot be required to submit to arbitration a dispute he has not agreed to arbitrate.

***U. S. Steel Workers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 80 S.CT. 1347;**

Drake Bakeries, Ltd. v. Local 24, 370 U.S. 254, 82 S.Ct. 1346;

Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 82 S.Ct. 1318.

The *Drake Bakeries* case, 370 U.S. 254, holds arbitration can be ordered and proceedings stayed only when the collective bargaining agreement requires the controversy arbitrated, and that this right to arbitrate can be waived, citing in footnote 17 *Lane Ltd. v. Larne Bros.*, 2 Cir., 243 F 2d 364. The *Lane* case held that where one sought arbitration and was forced to abandon the demand and seek judicial relief, the defendant cannot defeat the judicial action by asking arbitration. The *Lane* case cites *Radiator Specialty Co. v. Cannon Mills*, 4 Cir., 97 F 2d 318, holding that a delay of nine months (the time involved in the case at bar, August 1962 to May 1963) after suit was filed before seeking the remedy of arbitration in the contract is a *waiver* of this provision to arbitrate.

In the case at bar there was a suggestion of arbitration made by plaintiffs on June 26, 1962 which did not even get the courtesy of a reply. Suit was necessitated by this refusal and was filed August 13, 1962. Not until May 1963 was even a motion or request to arbitrate made by the defendants. Were there any contractual provisions to arbitrate, there is a waiver. Granting of the summary judgment motion by the stay on the affidavits was clearly error. This case presents a clear cut factual situation presenting waiver of any contended contractual provisions to arbitrate. With the mass of labor arbitration matters involving vital interests of both employer and employee, this Court has an oppor-

tunity to clarify and establish this very important point of law of labor relations in this case. Furthermore there was nothing in the collective bargaining agreement making the grievance-arbitration procedure an exclusive remedy.

III

THE CONTRACT

Another very important point clearly presented and which should be clarified by the decision of this court is the question as to whether the collective bargaining agreement must be in writing, and whether the contractual provisions as to arbitration with its detailed machinery must be in writing.

Under the Federal Arbitration Act, 9 USCA 2, an agreement to submit an existing or future controversy to arbitration must be in writing. Under California law, such an agreement must also be in writing. CCP 1291. It would appear that the same reasoning would apply to labor collective bargaining contracts in so far as arbitration is required. It would be indeed a strange situation where a non-union employee and his employer act upon and there is incorporated into the master and servant relationship the disclosed collective bargaining agreement, and then when a dispute arises find that the employers' association and the union statutory exclusive bargaining agent for the employees claim there is a secret understanding or modification or waiver arising from their former breaches of the very provisions in issue that change, alter and modify the contract as written and disclosed and acted upon, and that this oral agreement contains a provision requiring arbi-

tration of the dispute, not contained in the disclosed written contract. This would, if oral agreements are permitted as to arbitration, completely defeat and stay any attempted resort to the courts to enforce the written contract as disclosed and acted upon.

The Taft Hartley Act contemplates that the contract be reduced to writing, and executed as the final step in the collective bargaining process as it makes it an unfair labor practice to refuse to do so. This provision in the Master Agreement in the case at bar requiring any change, modification or alteration of the written agreement to be in writing is a sufficient demand to require any change to be reduced to writing and execution.

The Landrum-Griffin Act, Section 104 (29 USCA 414) is a wholesome and necessary law permitting any employee to determine the terms of the collective bargaining agreement by inspection of the written documents. This Act of Congress would be wholly defeated and meaningless if it were proper to show an employee under this Act a written contract, and then to permit the Union or the employer or both to contend that this is not the contract, but it is materially changed and altered by a patrol, secret agreement or by waivers of conduct of the employer and the union, or others by breach of the contract. Section 104 was enacted by Congress to correct a vicious practice of the Union and the employer having secret agreement very disadvantageous to the working man. When differences arose, the working man was faced with these secret agreements. The purpose of Congress was to permit the employee to learn the full terms of the collective bargaining agreement under which he was employed. To per-

mit secret or oral understandings or modifications as contended by the defendants and upon which the order of July '63 is based, is to make the Act of Congress meaningless, and to defeat its very purpose.

There is also an estoppel against the defendants contending the contract is other than that disclosed by the writings. Inquiry was made both under the Landrum-Griffin Act, Section 104, and through counsel. Defendants are not now in a position to contend the written contracts they disclosed, and the plaintiffs acted upon is different, and that there is some other and different, oral, secret agreement. When any plaintiff accepts dispatch, the terms of the collective bargaining agreement is incorporated and implied into the master-servant relationship. It is known and disclosed written contract that is part of this employment, and the defendant Union and the defendant PMA are *estopped* to contend it is different, or that the contract is not as it was acted upon, particularly the disclosed terms of compensation, including deferred contingent compensation (fringe benefits), for both the individual employer and the plaintiffs believed this applied, and PMA was paid by the individual employers upon this disclosed contract. The difficulty arises that PMA has not paid out the monies it received from the individual employers of the plaintiffs, but has fattened its pocket by retaining the difference.

The defendant PMA and the other defendants, having been caught with their hand in the cookie jar, and realizing that this involves very substantial sums of money unpaid to the plaintiffs and others similarly situated, have undertaken to amend the facts and contend there is a secret oral understanding over an indefinite

period changing, modifying and altering the collective bargaining agreement and obliterating from the agreement much of the solemn written contracts, including the Master Agreement for Clerks of April, 1952, and all subsequent modifications thereof in writing (even as late as June 22, 1962).

It is a serious situation in which the plaintiffs find themselves, very second class citizens. The large minority of non-union ship clerks find themselves with the less profitable and unwanted work refused by the union members who, through being a majority, can retain this union as the exclusive statutory bargaining agent who makes and enforces the contract.

The plaintiffs and the other non-union ship clerks receive only a part of the pay their employers pay to PMA. Their health and welfare fund contributions are used solely for the Union members. When they seek to enforce the written contract as disclosed, they are met with the contention that this is not the contract, but there are other secret oral agreements changing these writings. These petitioners suggest arbitration and get no reply. The written contract as disclosed provides them no remedy by arbitration. They file suit. Nine months later, after extensive motions, pleadings and procedures, they are faced with a motion for summary judgment upon claimed contract provisions to arbitrate not previously disclosed, and which has only been orally agreed upon in substance but not reduced to acceptable language nor executed. Upon this, they are denied any forum at all. Should they seek arbitration, it is under a vague, indefinite oral agreement covering arbitration, and to be told at every turn they took the

wrong step or did not act timely. This is no remedy. They cannot by this secret oral agreement be required to submit their cause to their adversaries for final determination.

It is not possible for the parties under federal statutes applicable to these jointly trusteed trusts to provide that non-union employees shall have their contingent deferred compensation earned on their labor taken from them and given by the trustees to union members only. This is just what has happened in this case.

The Welfare and Pension Fund payments generated on the plaintiffs' services are used solely for union members, under the guise of calling them "registered".

The earnings of the plaintiffs, generated for hours of work and contracted to be paid into the Mechanization Fund are not used for the plaintiffs, but are probably held by PMA and, if any part is eventually paid to the trust fund, it will be used solely for a union member employee and not for the plaintiffs and the other non-union employees, simply by not designating them as "registered".

The collective bargaining agreement provided for "joint consent" in "registration" without any standard or test for the union's exercise of this control and veto. A clause in the contract requiring those newly employed to be "recognized by the union" (*Phoenix Tinware Co. Inc.*, 100 NLRB 528) or to be "satisfactory to both parties to this agreement" (*Newton Investigation Bureau*, 39 NLRB 157) grants a veto power beyond the intent of the union security provisions of Section 8(a)(3) of the Taft-Hartley Act and is therefore illegal and void.

This case presents a question that is an important one requiring a decision of this court. How far can a union in its planned and hostile discrimination as a statutory exclusive bargaining agent go in its action toward non-union workers who it refuses to admit to its membership? Can it use their earnings in deferred contingent compensation solely for its own union membership? Can it make oral agreements to arbitrate and prevent the non-union employee seeking judicial enforcement of the contract or judicial determination of what the contract is and how it applies to non-union workers? Does this authority extend to requiring the non-union employees to submit their controversies with the union and employers' association and to their adversaries for determination? What, if any, are such non-union workers' remedies?

IV

A PARTY IS NOT REQUIRED TO SUBMIT HIS DISPUTES FOR DECISION TO HIS ADVERSARIES.

Since the policy of the law favors enforcing collective bargaining agreements to arbitrate disputes, the mechanics and methods of these arbitration proceedings become more and more important. Many of these contractual provisions are drawn with a view of a dispute between the employers on one side through the employers' association and the employees through their union collective bargaining agent on the other. Some written agreements are drawn as the Master Agreement for Clerks of 1952 in this case is drafted, to exclude all non-registered ship clerks (and where the union retains power to have affirmative assent to any "registration"

there just are no non-union employees given full "registration") from any remedy of arbitration. It does permit its union membership grievance machinery by appeal to the defendant committee where the Union vote is necessary for any action. Only if the Committee fails to agree by each vote, the employer and the employee members not concurring, can resort be had to another step or to arbitration. This arbitrator is selected by the defendant PMA and the defendant Union and may be removed by them. It is not likely any arbitrator would take his lucrative job in his hands to make other than a ruling in favor of these defendants.

Were the plaintiffs "registered", even then matters of dispatch and "registration" are specifically excluded from arbitration. Only with oral changes of the disclosed written contract is there provisions for arbitration, and then before the defendant Committee, their adversary and composed of their other adversaries, PMA and the Union representatives. Should it ever get to arbitration it is not before a neutral and disinterested person.

The grievance machinery is made so that it works only for the "registered" worker, those belonging to this closed group, the full book members of defendant Local 34, ILWU. Actually a union exists solely to fight the battle of all employees within its jurisdiction, and not to favor a faction of those employees. When it represents only a faction and is used as an instrument of oppression for a minority, it perverts and destroys all concepts of fair play and any semblance of justice.

It is a basic concept of fair play that a person have some semblance of justice in some tribunal somewhere

to try the disputes arising out of the collective bargaining agreement and its administration.

In the case at bar, there is absolutely no provision for any grievance or arbitration arising from misconduct or breach of the contract by the defendant Committee who does the actual dispatching through elected dispatchers in the jointly operated hiring halls, and who maintains and keeps these lists of "registration", which are in fact a list of the membership of defendant Local 34 ILWU. The collective bargaining agreement is very carefully and cleverly drawn to permit the discrimination against non-union employees and to prevent the remedy by any impartial arbitrator, and to require all matters to pass through both the port committee and the coast committee.

A similar situation arose and was urged in *Steele v. Louisville & N R Co.*, 323 U. S. 192, 65 S. Ct. 192, where it was urged that the employees had an administrative remedy before the Board under the Railroad Adjustment Act consisting of members chosen by both the employer and the Union. The Supreme Court held that this was no remedy because of the planned and purposeful discrimination of the Union.

In *Edwards v. Capital Airlines* (Ct. of App. - D. C. 1949) 176 F 2d 754, Cert. Denied 338 U. S. 885, certain plaintiffs brought an action after an adverse ruling before the Board under the Airline Act, consisting of two employers and two Association (union) members. The court pointed out that the grievances as to seniority though nominally against the employer company, was against the other employees, and the company was a mere bystander, and the Union could have taken a neu-

tral position, but it did not, and took a position adverse to appellants.

The *Edwards* case, 176 F 2d 754, points out that where there is a conflict of interest, a party does not have to submit his disputes for decision to his adversaries, and that Congress did not intend to submerge the minority's interest in the grievance machinery provided, and the employees had a right to have their grievance heard by more than the Union and the employer, for Congress anticipated and contemplated an effective participation. The case held that although there was normally a presumption of validity to the acts of the Board provided by an Act of Congress, yet it was subject to potentially extremely dangerous situations that would affect the rights of the minority nonmembers, and the court removed the doctrine of finality from the Board's action.

The *Edwards* case, 176 F 2d 754, is particularly applicable here, for any grievance machinery which relegates the employees to the hands of their adversaries, and which would require the very entity, the defendant Committee who is conducting the hiring halls and making the registrations to denounce themselves and their own conduct is a very strong showing; further, the *Edwards* case would prevent any arbitration being final, where the Union (and here the employers' association as well) select the arbitrator. Of course if an arbitration is not final, the courts will not stay judicial proceedings even where there is a valid contract to arbitrate. It is a particularly strong case, where both the unions and the PMA have been breaching the contract, and the employers' association has been pocketing sub-

stantial sums of money paid by individual employers for non-union employees' compensation and the part not diverted was used solely for the benefit of the defendant union's membership.

It is hardly one's idea of fair play to be required to submit one's cause to an arbitrator who holds his appointment and his lucrative arbitrations from the defendants, and expect the arbitrator to take a lucrative job in his hands to rule adversely to them.

A case by analogy is that of *Elgin J. E. R. Co. v. Burley* (1945) 325 U. S. 711, 65 S. Ct. 1296, where a Union collective bargaining agent settled a monetary claim for penalty wages under the Railroad Adjustment law. The court on page 733 points out that a collective bargaining agent has the authority to represent the employee before the Board but that in any matter involving settlement, the employee has a voice in it and Congress did not intend to submerge the individual and the minority interest and nullify the rights of the employee. On page 736 the court held that the Act of Congress gives more than the mere right to be heard by a Union and a carrier in two alternative situations, first where the Union in its action would do more than remotely affect the other employees, or in the alternative situation where the interest of the employee involved, is that of a non-member of the union, or the interests are opposed to the collective interests of a large number of employees represented by the Union, or the Union is hostile.

Are these appellants to be relegated to the law of the jungle and the mercy of the defendant union and its membership who are able to retain their union as this

exclusive statutory bargaining agent? Is there not some remedy before some court or in some tribunal somewhere to which these non-union workers may turn or is the door slammed in their faces on the basis there is an oral understanding between the defendants that stays all recourse to the courts? After suit is filed, may defendants by agreement among themselves defeat the plaintiffs' action? Being required to submit one's disputes to decision of one's adversaries is not any concept of fair play, nor is it any remedy.

V

DUTY TO ARBITRATE IS BASED SOLELY ON CONTRACT

U. S. Steel Workers v. Warrior and Guf Nav. Co., 363 U. S. 574, *Drakes Bakery, Ltd., v. Local 34*, 370 U. S. 254 and *Atkinson v. Sinclair Ref. Co.*, 370 U. S. 238, hold arbitration is a matter of contract, and a party cannot be required to submit to arbitration a dispute he has not agreed to arbitrate. Obviously, the parties cannot be required to arbitrate a matter unless there is a mandatory arbitration provision in the contract, which is solely lacking in the 1952 Master Agreement. Obviously, the plaintiffs cannot be required to arbitrate pursuant to a contract not yet negotiated, and which was not made for several years thereafter. Neither can the plaintiffs be required to arbitrate under an oral contract, the terms of which are not yet agreed upon nor reduced to writing between the parties, and in which the parties were then attempting to reduce to writing. Obviously, the plaintiffs cannot be required to arbitrate under a contract made long after the suit was filed, made in contemplation of this suit and in an

attempt to defeat it by requiring discrimination against non-union employees to be determined by the defendants themselves in their own selected method of grievance-arbitration, naming their own arbitrator.

Neither can the parties be required to arbitrate under a mandatory arbitration provision when the basis of the suit includes failure of the statutory collective bargaining agent to appropriately represent the employees or discriminate against them. This is particularly so, even Mr. St. Sure, then president of the defendant PMA, in his deposition point out that there was no intention to arbitrate the particular matters covered in this suit, but only such matters as a dispute on wages, which is only one part of this litigation and that not against the individual employer, but against the employers' association which has refused and neglected to disburse all the contract compensation money it has collected on the plaintiffs' work from their *individual* employers.

VI

COLLECTIVE BARGAINING AGREEMENT, DISCRIMINATION AND HOSTILE ACTS IN BAD FAITH BY THE STATUTORY COLLECTIVE BARGAINING AGENT.

The amended complaint is one under Section 301. The amended complaint (R-89-122) sets forth the disclosed written collective bargaining agreement in its provisions for a deferred contingent compensation (fringe benefits) including the two trusts. It sets forth that the plaintiffs are full-time employees as ship clerks and dispatched from hiring halls pursuant to the collective bargaining agreement.

The agreement creates the defendant Joint Committee that conducts these hiring halls in which the Committee acts, one vote by the employers association, defendant PMA, and one vote by the defendant Local 34 and this committee has control of the "registration" lists and makes the additions and subtractions thereto. Those in the full-time working force dependent for their livelihood by their work as ship clerks are designated as "registered" to distinguish those from seasonal or occasional members of the working force and the amended complaint (R-93) sets forth the provisions as to the registration to be done by mutual consent and that either party may demand additions or subtractions to the registration list as may be necessary to meet the needs of the port. The amended complaint sets forth the relevant parts as to the priorities and that preference of employment and dispatch shall be given to registered clerks registered as of June 1, 1951 and the section provides that a clerk not registered shall not be dispatched while a registered clerk is ready and willing to work. There is also quoted the provision against discrimination. The amended complaint alleges that the defendant Local 34 selects and directs the employee members of the defendant Joint Committee and that no person without the consent of this Local may be registered as a ship clerk, and that by this means the only fully "registered" ship clerks are of course those who are admitted to full book membership in defendant Local 34, in violation of the terms of the contract and of said local as an agent for hire and as acting statutory collective bargaining agent. The amended complaint sets forth how this is used so that only slightly over one-half of the full-time working force are registered

and only a slightly smaller number are not registered and this way a preference is given and discrimination had. The amended complaint sets forth that PMA as the paying agent receives the full compensation from the particular employer but only pays to the non-union (non-registered) for actual time and not according to the so-called "8-hour rule"; that the pension funds are paid by the individual employers for the various fringe benefits but these are used for the union members by this discrimination and this arbitrary designation of full book union members as "registered". The amended complaint sets forth this discrimination against the plaintiffs and the others who are non-union employees in both registration and dispatch and by restriction of the number of "registered" ship clerks, give the choice employment to the union membeship. It sets forth the violation of the collective bargaining agreement by this hostile, illegal, discrimination and acts of bad faith to arrive at this arbitrary misconduct.

The amended complaint seeks a determination of the nature of the contract and the rights of the plaintiffs under it, including the affect of these illegal provisions from the blanketing in of the illegal provisions under the old clerk's contract held illegal and void by this court in *NLRB v. Waterfront Employers Assoc.* (9 Cir-'54) 211 Fed 2d 946, where preference of employment and dispatch was by the terms of the contract granted union employees.

Vaca v. Sipes 386 US 171 89 S. Ct. 903 directly holds that where a statutory collective bargaining agent acts in violation of its duty to act for all members of a desig-

nated unit without hostility or discrimination and to exercise its discretion with complete good faith and honesty to avoid arbitrary misconduct, there will be an action for damages against both the employer and the union, apportioned according to the rules set forth in that case, even though the facts amount to an unfair trade practice, as this remedy is not pre-empted.

This *Vaca* case (386 US 171) contains an excellent discussion of the problems arising under the contractual remedies of a collective bargaining agreement, particularly where a union violates its statutory duty as such agent. This decision cites *Richardson v. Tex. and New Orleans R. Co.* 5 Cir '57 242 Fed 2d 230, in support of the proposition that Congress did not intend to shield employers from the natural consequences of their wrong by wrongful acts of the union in enforcement of the agreement. The *Richardson* case (242 Fed 2d 230) contains the following holding:

> "Furthermore, the Railroad in entering into the contract, was charged with knowledge that the Brotherhood as the statutory representative of its employees was under a duty to represent all employees for whom it acted fairly, impartially, in good faith and without hostile discrimination. (citing cases).
>
> "The contract should be read as if the void discriminatory provisions did not exist . . ."

It would therefore be not the written contract as disclosed, in the case at bar, but the written contract as disclosed omitting from it the void discriminatory provisions as they exist in that contract.

In *Vaca v. Sipes* 386 US 171, the Supreme Court in discussing the contractual remedies of the collective bargaining agreements and that they are often controlled by the union and the employers, and may well work unsatisfactorily or be unworkable for the particular grievant, cited Footnote 11. In this footnote is cited *Heller v. Liquor Salesmen Union Local 2* 2 Cir. '64, 338 Fed 2d 778, which is a suit for unlawful discharge and deprivation of disability insurance, etc., and for pay less than the collective bargaining agreement, all done with knowledge and consent of the union. The defendants pointing to a provision for mandatory arbitration, sought and obtained a stay of the proceedings in the lower court. This was reversed by the 2d Circuit on appeal in which the court points out that the complaint is based on failure of fair representation by the union bargaining agent. The decision points out that were this an ordinary suit for wrongful discharge, the clause would be available to the employer as a defense but where the action is based on wrongful conspiracy between the union and the employer, the employees cannot be forced to arbitrate that issue and the case holds that the procedure for arbitration would fail completely to settle the issues in such a case and indicates it would put the arbitration in the hands of the adversaries and that this was not the type of dispute or issues that were ever agreed to be arbitrated. We wish to point out to this court the striking parallel between this *Heller* decision by the 2d Circuit and the present action, by the plaintiff non-union employees against the union, employers association and their committee, consisting of members of the local union and the employers representative that runs the hiring halls and

maintains the registration list of ship clerks. We also wish to point out to this court the similarity between the testimony of St. Sure in the deposition in this case that the grievance-arbitration procedure is intended only for matters such as wage disputes and not for the issues involved in this case and the holding in the *Heller* case where the 2d Circuit came to the same conclusion.

Footnote 11 in *Vaca v. Sipes* 386 US 171 cites *Fiore v. Associated Transport, Inc.* (DC-Pa. 166) 255 Fed. Supp. 596. This case involved a Section 301 action by employees who lost their jobs from dovetailing of seniority, alleging bad faith, fraud and breach of duty by the union as statutory representative and claiming the union breached its duty to act fairly and impartially This case involved a motion to stay the proceedings under the provisions of mandatory arbitration in the bargaining agreement and the complaint alleges unfair labor practices as well as breach of the contract. The court, in denying this stay pointed out that *Humphrey v. Moore* 375 US 335 permitted the employees to sue although the contract contained provisions for arbitration and held that where a union acts contrary to its duty of good faith, arbitration under the collective bargaining agreement cannot be required. It points out that arbitration is available only where the union is on one side and the employees on the other.

In the case at bar, it is obvious that in the factual situation where we have the statutory bargaining agent delegating its discretion and duty to the defendant Local 34 (if such delegation of discretion is legally possible) we have a clear case of one where the union

restricts this particular preferred classification of "registration" to its full book members of the Local 34 so that they receive the choice of jobs, are dispatched for the time the ship is in port and not for one day at a time and have a priority of dispatch and employment. This is a situation where the full compensation is paid by each employer but the paying agent PMA pays the union members their full contract compensation and fattens its pockets on the differences it can short and does short the non-union employees. The fringe benefits are paid by each individual employer including the non-union men's hours on each dispatch but this is used solely for the benefit of the union members, whether it is the health and welfare plan or the vacation pay, the Kaiser medical and dental benefits, the retirement benefits or the multi-million dollar Mechanization Fund, which includes guarantees of a minimum of 35 hours' pay per week and large benefits to the union members, particularly on retirement. Even the grievance arbitration procedure is so drawn, in actual operation is conducted so that it only works to the benefit of the full book union members. Indeed even when the arbitration is purported to be final, St. Sure's deposition shows that it is changed by agreement between the parties of the union and the employers' association and as to them it is not final.

It should be pointed out that the disclosed written collective bargaining agreement is not followed but some vague, definite, unknown, secret, oral understanding as it may change from time to time is purported to be applied. Indeed this is easily explained by the testimony of Mr. St. Sure on his deposition that the ordinary shippers and steamship lines are not

the employers of longshoremen and ship clerks, but stevedoring companies are. The chaos on the waterfront could not be attributed to Harry Bridges alone but the responsibility must be shared by PMA, and employer's association, whose financial interest is to keep the waterfront in constant turmoil so that the particular stevedoring companies must include within their charges and pay for the extensive personnel for the administration of this employers' association. It is the policy of the law as enacted by Congress that the terms of employment of a particular industry, craft or skill of a particular area be determined and by collective bargaining, between the employer on one side and the employees through their statutory collective bargaining agent on the other side and that this contract on demand of either side be reduced to writing and disclosed to all employees and that all differences should be sought to be resolved between the employer on one side or the employers' association and the statutory collective bargaining agent on the other. This particular concept breaks down where there is a vague, indefinite and changing oral agreement that snorts and balks as a living thing to suit the occasion or where the statutory collective bargaining agent does not act equally for all employees in good faith and honesty to avoid arbitrary conduct. In the case at bar, we have both elements that are condemned by Congressional acts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

HOWARD B. CRITTENDEN, JR.
Attorney for Petitioners

February 4, 1971

(APPENDIX FOLLOWS)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRED A. ALEXANDER,
LOUIS P. CAMAROTA, GEORGE CATHRO,
ALBERT S. DIMOND, LEWIS FREEMAN,
FRANK MARANI, RAY C. MARVIN,
JAMES NEWELL and EARL D. PETERSEN,

v. *Appellants,*

PACIFIC MARITIME ASSOCIATION,
a non-profit corporation;
INTERNATIONAL LONGSHOREMEN'S &
WAREHOUSEMEN'S UNION,
an unincorporated association;
SHIP CLERKS ASSOCIATION, LOCAL 34
ILWU, an unincorporated association;
JOINT CLERKS LABOR RELATIONS
COMMITTEE, SAN FRANCISCO,
an unincorporated association;
H. J. BODINE, L. B. THOMAS,
WILLIAM CHESTER, K. F. SAYSETTE,
J. A. ROBERTSON and HUBERT BROWN
as Trustees of ILWU-PMA WELFARE &
PENSION FUNDS; HARRY BRIDGES,
H. J. BODINE, L. B. THOMAS,
K. F. SAYSETTE, R. J. PFEIFFER,
and CAPT. C. PRYOR, as Trustees of
ILWU-PMA MECHANIZATION FUND;
DOES ONE thru TWENTY,

Appellees.

No. 23470

[November 9, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: HUFSTEDLER and KILKENNY, Circuit Judges, and SMITH, District Judge.*

KILKENNY, Circuit Judge:

*The Honorable Russell E. Smith, Chief Judge, United States District Court for the District of Montana, sitting by designation.

Although the appellants attempt to argue the merits, this appeal presents for decision the sole issue of whether the district judge abused his discretion in dismissing appellants' amended complaint for lack of prosecution.

Appellants are non-registered ship clerks claiming rights to work on the waterfront in San Francisco. They are not members of the International Longshoremen's & Warehousemen's Union (ILWU), of which Local 34 acts as the exclusive collective bargaining agent of ship clerks in the San Francisco Bay area.

Appellee, Pacific Maritime Association (PMA), is a corporation whose members are steamship companies and other waterfront employers. It acts as the collective bargaining representative of employers of ship clerks in the San Francisco Bay area. Other appellees are J. A. Robertson, as trustee of the ILWU and PMA supplemental wage benefit fund; Local 34 of the ILWU; and certain other employee members of the joint labor relations committee and certain employee trustees of certain funds.

The background of this litigation commenced in June, 1962, when appellants suggested to some of the appellees that certain grievances be submitted to arbitration. Receiving no response, appellants, on August 13, 1962, filed a complaint in the district court alleging that PMA and ILWU had violated certain collective bargaining agreements by arbitrarily restricting hiring practices to fully registered ship clerks who were members of Local 34 of ILWU and that only union members were granted such registered status. On November 1, 1962, the district court dismissed the complaint on the ground that it dealt with unfair labor practices over which the National Labor Relations Board had exclusive jurisdiction. In December of the same year, the Supreme Court in *Smith v. Evening News*, 371 U.S. 195 (1962) held that the primary jurisdiction of the board did not apply so as to prevent the institution of an action in federal court by individual employees for alleged violations of collective bargaining agreements. Based on the decision in *Smith*, our court, on February 28, 1963, in *Alexander v. Pacific Maritime Assn.*, 314 F.2d 690 (9th Cir. 1963) reversed the decision of the district court and remanded the case with instructions to set aside the dismissal and grant appellants time within which to file an amended complaint.

The amended complaint was filed on April 12, 1963, again charging discrimination in favor of union members in the manner in which employment and employment benefits were dispensed under the collective bargaining agreement. On May 6, 1963, appellees moved for a summary judgment on the ground that the appellants had failed to exhaust the arbitration procedures found in the collective bargaining contract or, in the alternative, to stay the proceedings until such procedures had been fully exhausted. On July 19, 1963, the district court granted a motion for stay of proceedings pending disposition of the arbitration proceedings. From this order an appeal was prosecuted, but dismissed on the ground that the stay was not a final judgment from which an appeal could be taken. *Alexander v. Pacific Maritime Assn.*, 332 F.2d 266 (9th Cir. 1964).

On June 5, 1964, the appellants filed a "grievance" pursuant to the grievance-arbitration procedures outlined in the contract. On July 22, 1964, after a hearing before the joint checker labor relations committee, the committee found against the appellants, both on their claim that the provisions of the contract required they be registered and on their claim that they had been discriminated against in favor of union members.

On April 9, 1965, the appellants moved the district court to modify the stay and to proceed without the exhaustion of arbitration procedures. This motion was denied by order dated April 26, 1965, in which appellants were directed to proceed with its hearings before an arbitration committee. Following this order, on May 24, 1965, the committee notified the appellants and other interested parties that it was going to proceed with the arbitration. After a hearing, this committee concluded that there had been no violation of the anti-discrimination clause, at which time appellants were advised that the decision was subject to appeal to the Coast Arbitrator. An appeal was taken, but appellants failed to proceed with the arbitration procedures of the contract by refusing to agree to a clarification of issues.

Thereafter, appellants urged the district court to grant their motions and require the appellees to answer the amended complaint and appellants' 1962 interrogatories. Hearings were held on this motion on August 26, 1966. The court denied the motion on the

ground that appellants' arbitration remedies had not been exhausted, but emphasized that if appellees failed to use due diligence or good faith in proceeding with further arbitration proceedings, proper action could be taken in that appellants would be "still in court."

In October and November, 1966, the appellants filed their briefs in the arbitration proceeding. On June 30, 1967, the arbitrator made an award holding that appellants had failed to establish that there was a contract violation with respect to the substitute provisions of the contract regarding registration and that there was no contract violation of the provisions against discrimination. Neither appellants nor appellees followed through on the award.

Nine months later, on March 28, 1968, the district court, acting *sua sponte* issued an order requiring appellants to show cause why the action should not be dismissed for failure to prosecute. On May 10, 1968, appellants renewed their motion for an order requiring the union and PMA to answer the amended complaint and the interrogatories. At the same time, appellees asked the court to dismiss the case for failure to prosecute, or, in the alternative, to enter an order confirming and enforcing the arbitration award. On June 5, 1968, a hearing was held on the order to show cause and the pending motions. At the termination of the hearing, the court ordered a dismissal of the action. The formal order of dismissal was filed on June 14, 1968.

The order to show cause was issued in conformity with Rule 11,[1] Rules of Practice, United States District Court, Northern District

---

[1]Rule 11 provides: Quarterly, the Calendar Judge shall call a convenient number of cases from the General Civil File wherein no Memorandum to Set has been filed, being the oldest cases in chronological order according to the filing date thereof, upon an order to show cause, by affidavit or certificate of counsel filed with the Calendar Judge, why such cases should not be dismissed for lack of prosecution.

The Calendar Judge may (1) dismiss such cases for lack of prosecution; (2) remand them to their chronological place on the General Civil File (subject to further call on the next quarterly calling of that File); or, (3) if the facts warrant, order a day certain for the filing of a Memorandum to set under Rule 2, whereupon the case shall be re-calendared automatically before the Calendar Judge for dismissal or transfer to the Civil Active Calendar.

of California, effective July 16, 1962. It is well settled in this circuit that a district court has power to dismiss an action for want of prosecution on its own motion, both under Rule 41(b), FRCivP, and under its local rule, or even in the absence of such rules. *Pearson v. Dennison*, 353 F.2d 24, 28 (9th Cir. 1965); *Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406, 408-409 (9th Cir. 1940); *States Steamship Co. v. Phillipine Air Lines Co. & Qantas Airways*, 426 F.2d 803 (9th Cir. 1970). To the same effect is *Link v. Wabash Ry. Co.*, 370 U.S. 626 (1962). The exercise of the power to dismiss is discretionary and will be reversed only for an abuse of that discretion. *Fitzsimmons v. Gilpin*, 368 F.2d 561 (9th Cir. 1966). Unreasonable delay creates a presumption of injury to appellees' defenses. *Pearson v. Dennison, supra*, p. 28.

Although each case must depend upon its own facts, a good rule of thumb to be followed is that the exercise of discretion by the trial judge should not be disturbed unless there is "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *States Steamship Co. v. Phillipine Air Lines Co., supra*, p. 804.

On the record before us, it seems obvious that appellants were attempting to circumvent completely the order of the district court requiring an arbitration and the award made as a result of such order. Instead of moving to set aside the award, the proper practice under the circumstances, the appellants for nine months ignored it and moved only after the court, acting *sua sponte*, issued an order to show cause why the case should not be dismissed for failure to prosecute. Taking a long hard look at the entire record, therefore, we cannot say that the district judge abused his discretion in dismissing the complaint.

Inasmuch as the district court did not reach the merits, neither do we. Nor do we express any opinion on whether the arbitration award was void for want of subject matter jurisdiction or extrinsic fraud.

AFFIRMED.

SMITH, District Judge, dissenting.

I respectfully dissent. I am aware that we do not reach the merits upon an appeal from a dismissal for want of prosecution, but in the unique circumstances of this case I do not believe that we can appraise the district court's exercise of discretion without revealing the positions of the parties. The complaint, prolix as it is, does show that:

1. The plaintiffs are ship clerks steadily employed on the San Francisco waterfront.

2. They do not belong to the union (which refuses to admit them), but for collective bargaining purposes are represented by defendant, ILWU Local 34, which is the exclusive statutory bargaining agent.

3. ILWU and defendant, Pacific Maritime Association, which represents the employers, have reached a collective bargaining agreement which fixes the terms and conditions of the employment of all ships clerks.

4. The agreement distinguishes between registered ship clerks and non-registered ship clerks, who though required to make payments to the union, are not members.

The complaint, in effect, alleges that the defendants, by means of the collective bargaining agreement, have arbitrarily made second class employees out of the plaintiffs, have designed a system which keeps plaintiffs in the second class category permanently, and have imposed serious discriminations upon them. These allegations, if true, would warrant an inspection of the facts and law surrounding the collective bargaining agreement to determine whether ILWU has been guilty of such breaches of its fiduciary obligations to plaintiffs as to render the discriminatory provisions of the agreement void. (See Steele v. L & NR Co., 323 U. S. 192 (1944); Ford Motor Co. v. Huffman, 345 U. S. 330 (1953); Vaca v. Sipes, 386 U. S. 171 (1967).

As indicated in the majority opinion defendants filed a motion for summary judgment on the ground that plaintiffs had failed to exhaust the arbitration procedures. Proceedings were then stayed and over plaintiffs' protests (even to the extent of a fruitless ap-

peal to this court) the case was sent off for arbitration. Under the provisions of the collective bargaining agreement the arbitrators had no power to pass upon plaintiffs' contentions that the collective bargaining agreement was void.[1] Pending termination of the arbitration, plaintiffs again tried to get the stay order lifted so that defendants would be required to answer the complaint and certain interrogatories which plaintiffs had propounded. These attempts were unsuccessful. Plaintiffs lost the arbitration and nine months later their case was dismissed for want of prosecution.

What happened here was that plaintiffs were sent off to arbitrators who could do nothing but apply the contract as written; they were foreclosed, and still are, from urging in court the invalidity of the provisions of the contract upon which the arbitrators based their decision, and finally had their case dismissed because they didn't take some action about an arbitration award which they didn't ask for, didn't want, and shouldn't, at least before the validity of the contract was determined, have been subjected to. I think that the defendants who started the arbitration matter in the first place and who won it, had the duty to do whatever ought to have been done about the arbitration award, but in any event I do not think that the plaintiffs' duty to do something about the award was so clear that it can be said that their failure to act warranted a dismissal for want of prosecution.

---

[1]The agreement provides: "Powers of Arbitrators shall be strictly limited to the application of the agreement as written."

[Title of Court and Cause]

ORDER DENYING MOTION FOR SANCTIONS, ETC.

This matter having been argued, briefed and submitted for ruling,

It Is Ordered that plaintiffs' motion for sanctions be, and the same hereby is, Denied. *Smith v. Evening News Assn.*, 371 U.S. 195.

It Is Further Ordered that defendants' motion for a stay of proceedings be, and the same hereby is, Granted. *Andrews, et al., v. Pacific Maritime Association, et al.*, Superior Court of California; *Holderby v. Operating Engineers*, 45 Cal.2d 843.

It Is Further Ordered that the remaining motions submitted by the defendants be stayed pending disposition of the case on arbitration.

Dated, July 19, 1963.

George B. Harris
United States District Judge

Filed July 19, 1963.
Clerk, U.S. District Court.

[Title of Court and Cause]

AMENDED COMPLAINT

Now come plaintiffs and for cause of action allege:

I

That Federal Court jurisdiction is based upon *Section* 301 of the National Labor Relations Act, 29 *USCA* 185 (breach of collective bargaining agreement), 29 *USCA* 1331 (Federal question) and 29 *USCA* 1337 (commerce) and 29 *USCA* 301, et seq. (Welfare and Pension Trust Provisions). The collective bargaining agreement hereunder involved construction and validity of portions under 29 *USCA* 401, et seq., 412 *and* 414 (Labor and Management Disclosure Act), and 29 *USCA* 151 et seq. (National Labor Relations Act).

II

That the defendant ILWU is an unincorporated association and labor union, with its principal place of business in San Francisco, and was at all times and is now an agent for hire and compensated therefor by each of the plaintiffs to represent them as a collective bargaining agent as ship clerks in the Port of San Francisco and said union was and is the exclusive statutory collective bargaining agent under 29 *USCA* 151 et seq. for all ship clerks employed in the Port of San Francisco under the collective bargaining agreement, and a party to said collective bargaining agreement.

III

That the defendants Does One through 20 are fictitious named defendants and their names are unknown to the plaintiffs.

IV

That at all times herein mentioned the Pacific Maritime Association, hereinafter called PMA, was and is an unincorporated association with its principal place of business in San Francisco, California, and conducted and conducts business as such for its members who are employers of ship clerks including ship clerks employed in the Port of San Francisco.

V

That there is a collective bargaining agreement covering the hours, compensation and working conditions and terms of employment of ship clerks on the Pacific Coast, including the Port of San Francisco, and said agreement is in writing and executed by the defendant ILWU as each bargaining representative and agent of the employee ship clerks, and by the defendant PMA on behalf of the employers. That said bargaining agreement is entirely in writing and consists of the following written documents executed as aforesaid, to wit:

1. Master Agreement for Clerks and Checkers and Related Classification, dated 4 April 1952

2. Amendment dated 10 July 1953

3. Supplementary Agreement dated 14 June 1956

4. Vacation Amendment to Pacific Coast Master Agreement for Clerks and Checkers, 1951-3, as Amended

5. Memorandum of Understanding dated 10 August 1959

6. Memorandum for Settlement of ILWU Contract Renewals, dated 3 July 1959

7. Memorandum of Agreement on Mechanization and Modernization dated 18 October 1960 (unsigned)

8. Memorandum of Understanding dated 15 June 1960

9. First Amended ILWU-PMA Pension Agreement dated 29 July 1957

10. Second Amended ILWU-PMA Welfare Agreement dated 29 February 1952

11. Memorandum of Agreement dated June 22 1962. Said bargaining agreement includes said Master Agreement for Clerks and Checkers dated 4 April 1960, that contains the following provisions:

> "*Modification.* The parties realize that from time to time after agreements similar in part to this agreement have been executed, one party thereto will contend that the other party has at some time during the term of agreement orally agreed to amend, modify, change, alter or waive one or more provisions of the agreement, or, that by the action or inaction of such other party, the agreement has been amended, modified, changed or altered in some respect. With this realization in mind and in order to prevent such contention being made by either party hereto, insofar as this agreement is concerned, the parties have agreed and do hereby agree that no provision or term of this agreement may be amended, modified, changed, altered or waived except by a written document executed by the parties hereto."

That said quoted written provision has not been modified and is in full force and effect since its execution in 1952.

VI

That the said bargaining agreement not only provides for the hourly pay but as part of the individual's compensation provides for deferred contingent compensation in the form of moneys paid into trust funds within the provisions of 29 *USCA* 186 and 301, et seq. That one of said provisions in said collective bargaining agreement is the payment by the employer to the ILWU-PMA Welfare and Pension Funds for the benefit of all employees in the industry, upon each hour of work performed by each ship clerk employed under said agreement including each individual employment of each plaintiff. That as a portion of said contract of employment, there is paid by the employers of each employee, including the plaintiffs, and disbursed by the defendant PMA for its members, annual vacation pay to those on the regular working force who have worked 700 hours or more in the preceding calendar year. That as part of said compensation there is contracted to be paid into the Mechanization Fund under the provisions of the Federal Law applicable to such employees trust funds, 29 *USCA* 186 and 301 et seq., the lump sum of $1,500,000 on or about June 15, 1960, and an annual contribution of $5 million, payable in June each year for each of the following 5½ years, which Mechanization Fund is for the purpose of providing death benefits or retirement funds if the employee lives to retirement, and to guar-

entire employment at straight-time pay for 35 hours each week for each person in the permanent working force in the Maritime Industry on the Pacific Coast who was so employed in 1958.

VII

That the ship clerks in the Port of San Francisco are engaged in the flow of interstate and foreign commerce through the Port of San Francisco and are part of the Maritime Industry in said Port.

VIII

That the plaintiffs in this action were and are full time employees and working as ship clerks under the bargaining agreement and the plaintiffs and each of them have worked continuously as such ship clerks in the Port of San Francisco for the past years, as herein set forth, to wit:

Name	Years, Full-Time
Alexander, Fred A.	6
Camarota, Louis P.	6
Cathro, George	12
Dimond, Albert S.	12
Freeman, Lewis	12
Marani, Frank	6
Marvin, Ray C.	10
Newell, James	12
Petersen, Earl D.	9

That each of the plaintiffs worked for said years and each is now available for such work and each is skilled as such ship clerk and a member of the perma-

ment working force of such ship clerks in the Port of San Francisco and each of the plaintiffs was and is dependent chiefly upon said employment as a ship clerk for his livelihood and each was and is available for dispatch on ordinary working days during ordinary working hours from Hiring Halls maintained under said bargaining agreement.

IX

That under said bargaining agreement there was and is created for the Port of San Francisco an unincorporated association and committee, one half of the members of the committee are designated as "employer members" and selected and directed by the defendant PMA, and the other half of said committee are designated as "employee members" and are selected and directed by the defendant Ship Clerks Association, Local 34, ILWU. The said defendant Committee is designated as the Joint Clerks Labor Relations Committee and sometimes referred to in portions of the bargaining agreement as "Checkers Joint Port Labor Relations Committee of San Francisco and Stockton." That defendant Joint Committee in the Port of San Francisco has and does now consist of two members, one selected by and who acts for the PMA and one selected by and who acts for the defendant Local 34, ILWU, and both the employer member's and the employee member's vote is necessary for action by said Committee. That under the said bargaining agreement the said defendant Committee runs and maintains the two Hiring Halls from which

ship clerks are dispatched to the various maritime jobs in the Port of San Francisco area and said defendant Committee under said bargaining agreement has the control of the "registration" lists in said Port making additions and subtractions thereto.

X

That the said bargaining agreement contains provisions that persons employed as ship clerks thereunder who constitute the full-time working force and depend on such work as ship clerks for their livelihood are designated as "registered" ship clerks in said written agreement in contrast and to distinguish them from those who are only seasonal or occasional members of the working force of ship clerks and who depend upon other employment for their principal livelihood and are not permanent full time members of the regular working force. That the master agreement provides:

> "(a) All registration shall be by mutual consent, except that this section shall not deprive either party to the agreement from demanding additions to or subtractions from the registration lists as may be necessary to meet the needs of the port. When objecting to the registration of any man, members of the Joint Port Labor Relations Committee shall be required to give reasons therefor.
> (b) When it becomes necessary to drop men from the registration list, seniority on the list shall prevail."

Another part of the agreement provides:

> "(a) When it becomes necessary to add men to the registration list, first preference of registra-

tion shall be given to men who now have partial or limited registration and employment in the industry; second preference of registration shall be given to men with previous registration in the industry who were not de-registered for cause; third preference of registration shall be given to men who had partial or limited registration in the industry and who were not de-registered for cause.

(b) Suitable personnel with clerical background or experience in the maritime industry, longshoremen and other workers covered by contracts with the PMA and ILWU shall likewise be accorded preference of registration after the application of the preceding paragraph in registering additional clerks."

That said master agreement also provides:

"(a) Preference of employment and dispatching shall be given to registered clerks who were registered and available for employment in any of the occupations covered by Sec. 2 of this agreement as of 1 June 1951, including registered clerks absent from the industry or inactive because of leave of absence granted by the Joint Port Labor Relations Committee or because of illness or other reasons certified to by the Joint Port Labor Relations Committee.

(b) There shall be no favoritism or discrimination in the hiring or dispatching or employment of any clerk qualified and eligible under the agreement.

• • •

(d) Clerks not on the registration list shall not be dispatched from the hiring hall or employed

by any employer while there is any man on the registered list qualified, ready and willing to do the work."

That the said collective bargaining agreement provides:

"There shall be no discrimination in connection with any action subject to the terms of this agreement either in favor of or against any person, because of membership or non-membership in the union, activity for or against the union or absence thereof, or race, creed, color, national origin or religious or political beliefs."

That the said written agreement by written supplement provides that the master agreement provisions as to registration requires there to be maintained an adequate registered working force of ship clerks.

XI

That the defendant Ship Clerks Association, Local 34, ILWU, is an unincorporated association and union and maintains its principal place of business in San Francisco, California, and the defendant ILWU as both the agent for hire and compensated therefor by the plaintiffs and the exclusive statutory bargaining agent delegated and delegates to the defendant Local 34 ILWU the administration of said collective bargaining agent and representation of all ship clerks under the said collective bargaining agreement for the Port of San Francisco. That the said defendant Local 34 was and is employed as agent for hire and compensated therefor by each of the plaintiffs in all such duties.

XII

That the defendant Union, Local 34, ILWU, selects and directs the employee member of the defendant Joint Committee and said employee member is currently the business agent of said Local 34. That without the vote of said employee member, no person can be or is "registered" as a ship clerk by said defendant Committee. That by said mechanics the said defendant Union, Local 34, ILWU, has prevented the addition of the names of registered ship clerks in the Port of San Francisco, and notwithstanding said provisions as to registration and that the said registration shall provide an adequate working force, the said defendant Union by withholding its approval to individual registration has and does now limit the number of names enrolled as "registered" to approximately one half of the total persons constituting said full time working force of said ship clerks in said Port and to the number needed to constitute said adequate working force. That during the existence of said agreement to the present time, the defendant through its said representation on the said Committee, has and does now arbitrarily restrict its consent involving said fully "registered" ship clerks, solely to applicants therein who are and were at the time of said "registration" full book members of Local 34, ILWU, in violation of said terms of contract and in violation of its said duty as agent for hire and as said statutory collective bargaining agent.

XIII

That the said defendant ILWU and the said defendant Local 34, ILWU, and the employee members

of said defendant Committee has and does now, violate the said provisions of the said contract against discrimination by acts of planned, purposeful and hostile discrimination against the plaintiffs and each of them for the sole reason that the said plaintiffs and each of them were not and are not now full book members of said defendant Union or either of them, although the plaintiffs and each of them have sought membership therein as full book members and are qualified for such membership and would be members except for the arbitrary refusal of the said Union and each of them to admit the plaintiffs who have complied with all conditions precedent for such membership.

XIV

That the said defendants ILWU, Local 34, ILWU, and employer members of the defendant Committee have breached the said collective bargaining agreement by failure to enter upon the Committee's list of "registered" ship clerks in the Port of San Francisco the plaintiffs and each of them and by failure to dispatch the plaintiffs without discrimination, under the terms of said collective bargaining agreement and by failure to maintain the list of ship clerks at an adequate number as in the contract provided. That the said defendant Committee has breached said collective bargaining agreement by failure to register an adequate number notwithstanding demands by the employers for an adequate registered "registration" of ship clerks in said port. That said breaches of said contract were done to grant preference to those ship clerks who are full book members of said Local 34.

That prior to the said Master Agreement on 4 April, 1952, the bargaining agreement in effect on June 1, 1951, and prior thereto, was a certain written bargaining agreement known as the Pacific Coast Longshore Agreement dated 6 December, 1948, and supplemented by the Ship Clerks and Checkers Agreement of January 17, March 11 and March 25, 1949, and that by its terms said prior written collective bargaining agreement gave preference of registration and employment to said Local 34 union memberships. That as a result thereof only union members were fully "registered" as ship clerks on June 1, 1951, and all such "registered" ship clerks were defendant Local 34, ILWU union members. That the said prior written collective bargaining agreement in effect on June 1, 1951, as aforesaid, was determined illegal and void in proceedings involving the defendant ILWU and Local 34, ILWU, in 90 *NLRB* 1021, 93 *NLRB* 294 and the adjudication of the 9th Circuit Court of Appeals, in 211 *Fed.* 2d. 362, by reason of said preference of employment and registration. That said adjudicated illegal provisions in effect on June 1, 1951, are blanketed in and carried into the current bargaining agreement by a seniority date granting preference of employment and dispatch for those registered on June 1, 1951, under said illegal and void provisions of said prior agreement. That the illegal provisions of said agreement are blanketed in and carried into the current agreement by the defendant Joint Committee keeping in effect the "registrations" made under said prior illegal agreement, and by the arbitrary re-

fusal of said Union, Local 34, ILWU, by its said employee representation on the defendant Committee to approve sufficient "registrations" additions to include a force sufficient to perform said ship clerk work in said Port, with the intention thereby to give preference and unlawful priority in violation of said contract. That by keeping the said "registrations" to approximately one half of the said full time working force dispatched from day to day from said Hiring Halls, the "registered" members which are co-extensive with the said defendant Local 34 union full book membership, are dispatched from time to time from the Hiring Halls and given priority of dispatch and employment and as a consequence obtained and now obtain the better, the more sought-after, and the far more profitable employment as said ship clerks. That the additions to said fully "registered" list of ship clerks in the Port of San Francisco have been and are now, by said mechanics, limited solely to said Local 34, ILWU, full book union membership. That the giving of the uncontrolled discretion to the said defendant Union, through said employee member of said defendant Joint Committee in "consent" to registration of ship clerks, by requiring "mutual consent" of both said employer and employee members to each individual "registered" is illegal and void.

XVI

That within the four years last passed on numerous occasions, and on or about June 26, 1962, each of the plaintiffs duly and regularly requested that he be duly "registered" as a ship clerk by the defendant

Committee and enrolled on its records under said bargaining agreement, but the said defendant Committee has and does now wrongfully refuse, neglect and fail without just cause or excuse to enroll the plaintiffs or any of them as "registered" ship clerks, but has and does now register others who join the working force of ship clerks subsequent to the plaintiffs in violation of said agreement. That the plaintiffs Albert S. Dimond, Lewis Freeman and James Newell were at one time duly "registered" in the Maritime Industry and were deregistered without cause and without notice by the said defendant Union arbitrarily removing their names from said list of "registration," probably for want of union membership in defendant Local 34. That each of the plaintiffs is entitled to "registration" and preference therefor under the said contract which was and is violated by the said defendant Committee and its failure to follow said contract provision That the said defendant Committee has and does now fail, refuse and neglect to make the ministerial act of entering each of the plaintiff's names in said "registration" list of full time ship clerks employed in the Port of San Francisco to designate each as a member of the permanent working force as provided in said contract. At no time when such applications for "registration" or request was made by the plaintiffs therefor did the Joint Committee or either of its members ever state, to the plaintiffs or any of them, or otherwise, any grounds or reasons or any objection to any of the plaintiffs' registration as provided in the contract, and did thereby breach said contract.

XVII

That each of the plaintiffs is a party to said collective bargaining agreement, and said contract was made for the benefit of each. That the said collective bargaining agreement is incorporated in and made a part of each plaintiff's employment on each individual dispatch and as such ship clerk. That each plaintiff has duly and regularly contributed his portion of the maintenance of the said Hiring Halls as provided in the contract. That as a part of the contract of hire of said defendant Unions, the plaintiffs and each of them have duly and regularly paid and contributed assessments for caucuses and representations to the said defendant ILWU, and to the defendant Ship Clerks Association, Local 34, ILWU, and said contribution for maintenance of hiring hall assessments and other payments to the said Unions including said representation and caucus assessments is identical with and varies from month to month, with the full book members' dues and assessments of such full book members of Local 34, ILWU.

XVIII

That in addition to the so called "preferred" employees employed on a monthly basis who for the most part are supervisory employees in the Maritime Industry, and who are full book members of Local 34, ILWU, there are approximately 450 men who constitute the full time working force of ship clerks in the Port of San Francisco available for and normally dis-

patched from day to day from the two hiring halls in the Port of San Francisco under said collective bargaining agreement. That approximately 225 of said 450 men are "registered" and are also full book members of said Local 34 and approximately 215 of said permanent working force, or about 48% thereof, including the plaintiffs, are nonetheless full time employees, and members of the permanent working force but are arbitrarily discriminated against and are not "registered" nor are they such full book union members. That the said defendant ILWU, Local 34, has determined that there is and has existed a necessity for a substantial increase in the number of "registered" ship clerks in the Port of San Francisco, but for the purpose of maintaining its full book members and as a part of said planned, purposeful and hostile discrimination against the plaintiffs, both as said statutory bargaining agent and as agent for hire in violation of its contractual duty as such agent for hire, has and does now violate said contract by both refusing to follow the terms of the said contract as to registration and the preferences therefor and also to maintain an adequate working force as provided in said written agreement.

And for a Second and Separate Cause of Action for Declaratory Relief, Plaintiffs Allege:

I

Plaintiffs reallege paragraphs I through XVIII of their first cause of action.

That the plaintiffs have been and are now informed by the various shipping companies and stevedoring companies as individual employers, to which plaintiffs have been and are now being dispatched from time to time by the hiring halls as ship clerks, that such employers who are members of the defendant PMA pay the full compensation provided by the collective bargaining agreement on each of the plaintiff's employments to the said PMA including the wages under the so called "8 hour rule," the welfare and pension payments generated and computed on an hourly basis on each of the plaintiff's services as such ship clerks, and the payment to the said Mechanization Fund by each of said employers upon each of the plaintiff's work and the vacation pay under said collective bargaining agreement on each said hour of work by each of the plaintiffs in such individual employment. That the said defendant PMA does not pay plaintiffs according to said collective bargaining agreement, but on the contrary the said PMA pays the full book members of Local 34 according to said contract, but does not pay the plaintiffs or any of them from such compensation remitted by employers, for their work in the event the hold or ship is loaded or the plaintiff's individual dispatch is terminated prior to eight hours, in accordance to the "eight hour rule" wherein a ship clerk is paid for eight hours of work if he works on any single day more than four hours but less than eight hours. The plaintiffs' coun-

sel is informed by counsel for the defendant PMA that the said welfare and pension fund contributions are immediately remitted by the said PMA to the trustees for said fund including the moneys contributed by the plaintiff's individual employers. That the said defendant PMA does not pay any portion of the vacation pay or of the said Mechanization Fund to the plaintiffs or for their use, or benefit.

III

That the defendants H. J. Bodine, L. B. Thomas, William Chester, K. F. Sayuette, J. A. Robertson and Hubert Brown are the Trustees of the ILWU-PMA Welfare & Pension Funds. That the said collective bargaining agreement until February 20, 1962, provided that said Welfare and Pension Fund was used for and the benefits thereof extended to all persons working under said collective bargaining agreement including the plaintiffs. That under said Trust and the terms thereof, and under the said collective bargaining agreement the Fund is for:

(a) the purchase of contracts of insurance for each employee including plaintiffs;

(b) to pay group medical, surgical and hospital benefits under contracts with the Kaiser-Permanente Health Plan for the said employees including the plaintiffs, and their immediate family, and for dental benefits for dependent children of such beneficiaries and for supplementary maternity benefits for such beneficiaries under said surgical, medical and hospital coverage contract.

That said payments were duly made and such benefits furnished the plaintiffs and each of them until 1958, when the said defendant Trustees breached the said contract and thereafter failed, refused and neglected to purchase either said insurance contracts or group hospital, medical and surgical and other benefits for the plaintiffs or any of their dependents. That on February 28, 1962, the said defendant ILWU in violation of its said duty as such agent for hire for the plaintiffs and as exclusive collective bargaining agent for all ship clerks including the plaintiffs, agreed with the defendant PMA, who well knew of said violation of said duty of the said defendant ILWU, to amend said welfare and pension fund portion of the collective bargaining agreement retroactively to June 1, 1961, so that only an arbitrary portion, to wit 52% of the said ship clerks who were full book members of the Local 34, and only such full book union members, would receive all of the benefits from said trust. In violation of the said Federal Statutes applicable to such welfare and pension funds, the said defendant fund Trustees have and do now use said funds including the compensation generated upon the plaintiff's services from their individual employers, so paid through PMA as aforesaid, for only the said 52% of ship clerks who are said full book members of Local 34, and not for all employees under said fund or in said working force.

IV

That the defendants Harry Bridges, H. J. Bodine, L. B. Thomas, K. F. Sayette, R. J. Pfeiffer and Capt. C. Pryor are Trustees of said Mechanization

Fund. That in violation of the express terms of said written agreement, there have been created for the purpose of violating said contract two so called "funds" consisting of said defendants designated as trustees of "Vesting Benefit Fund" and said defendants as trustees of "Supplemental Wage Benefit Fund" an unfunded trust. That in violation of the said contract the said PMA disburses directly to only 410 individuals, nevertheless defendant trustees stating in their report to the Department of Labor that there are 1,390 more who will be eligible but are not currently receiving benefits, and such funds are disbursed in the name of the said Trustees from their accounting offices at 16 California Street, San Francisco, to said unknown 410 beneficiaries. That the said defendant PMA has disbursed in said defendant Trustees' name and in violation of the contract during the year 1960 the sum of $3,000, during the year 1961 the sum of $7,521.40 and during the calendar year 1962 the sum of $814,870.00 in the name of said Trustees as disbursements under said "Vesting Benefit Trust Fund" as an "unfunded plan." That the said defendant PMA has disbursed to the said Trustees who purport to hold under "Supplemental Wage Benefit Trust Fund," in the year 1960, $784,500.00, in the year 1961, $1,786,341.20, and in the calendar year 1962 the sum of $534,191.00. That no part of said "Supplemental Wage Benefit Trust Fund" has been or is now being disbursed or paid to any person and in violation of the collective bargaining contract defendants Trustees have not paid plaintiffs any part though plain-

tiffs have not, by reason of the other breaches of the contract herein set forth, had the 35 hour minimum work and are entitled to benefits thereto for some months prior to this action. That the balance of the $11,500,000.00 Mechanization Fund payable to and including June 1962 is held:

(a) by the defendant Welfare Fund Trustees in the sum of $3,670,926.00, in contravention of said agreement, but for the purposes of said Mechanization Fund under said October 18, 1960, Supplement Agreement;

(b) by the defendant PMA, in the sum of $3,040,170.00 unpaid in contravention and in breach of said agreement, but nevertheless collected under said collective bargaining agreement from its members for work performed by the plaintiffs and others in the Maritime Industry, and said sum is held by said defendant PMA in contravention of and in violation of both said contract and of the Federal Statute applicable to such Welfare Funds.

That the said Mechanization Agreement Supplement dated October 18, 1960, provides for the payment of said $1,500,000.00 payable by the employers in 1960 and $5 million per year payable in each year subsequent thereto, for a period of five and a half years, as aforesaid, and provides that said Funds shall be used solely for the benefit of the full time working force in the Maritime Industry including ship clerks

employed in 1958, of which each of the plaintiffs is part, for the purpose of guaranteeing full time employment at straight pay to all of said group and to provide death benefits of approximately $5,000 or of voluntary retirement benefits of approximately $7,-960.00 upon retirement. That the said defendant ILWU in violation of its said duty as said agent for hire and compensated by the plaintiffs, and as said exclusive collective bargaining agent of all ship clerks, both union and non-union, and with full knowledge of the said defendant PMA of said employment and said duty of ILWU,, made as a part of said agreement of October 18, 1960, a provision that said benefits would not be used for all employees employed in 1958, but would be arbitrarily restricted to those employees designated as "registered" and thereby excluded all benefits from the plaintiffs and other non-union employees who are arbitrarily not so "registered" by the defendant Committee. That said restriction is in violation of the Federal Statutes applicable to such funds.

V

That by the said mechanics and practice of the said defendant Joint Labor Relations Committee and said defendant Unions violated and breached said collective bargaining agreement as follows:

1. By discriminating against the plaintiffs and others who were and are non-union employees in both registration and dispatch in violation of the specific terms of the contract therein provided against such discrimination.

2. By failure to maintain the number of registered at an adequate number to provide an adequate working force of ship clerks in the Port of San Francisco on such registered list, in order to give preference to said full book members of said defendant Local 34.

3. By making "registered" coextensive with said defendant ILWU, Local 34, full book membership.

4. By failure to meet the demands of the employers for an adequate registered working force.

5. By giving priority of dispatch to those who are full book members of Local 34 in violation of the terms of the contract.

6. By limiting the selection of the employee member of said defendant Committee solely to votes of those who were full book union members and permitting only such full book members of Local 34 to vote and select such representative through the said Union.

7. By restricting the election of the dispatchers who actually hand out the individual jobs in each of the hiring halls on each dispatch, to dispatchers elected solely by an arbitrary group limited to those who are full book members of Local 34, and not permitting the plaintiffs and others who are not full book members to vote for or take part in the selection and election of such dispatchers.

8. By keeping in effect the "registration" of ship clerks who were "registered" under the said illegal provisions of the prior contract so held illegal as to

such union membership preference of registration and employment.

9. By violating the said contract and by not following the provisions as to preference and priority and the provisions as to registration, the said defendants grant an unlawful preference in dispatch and employment to those having this arbitrary and unlawful preference, and in addition said defendants do not dispatch equally and without discrimination all those qualified and eligible under the said contract including the plaintiffs.

VI

That the said ILWU in violation of its said duty as an agent for hire and compensation paid by the plaintiff, and its duty as said exclusive collective bargaining agent to act impartially for all employees, and with the cognizance and knowledge of the defendant PMA of said defendant's said violation of its said duties provided and now provides in said collective bargaining agreement that all matters of arbitration and mechanics for handling of grievances in connection with registration or dispatch, and all other matters are denied and prevented the plaintiffs and each of them who are not "registered" as ship clerks by said defendant Committee. That on or about June 26, 1962, each of the plaintiffs, through their counsel, wrote each of the defendants and in writing requested that if they or any of them know of any mechanics or arbitration or terms in the collective bargaining agreement as to arbitration covering any of the matters in dispute, that the plaintiffs would welcome the

mechanics of arbitration to solve these disputes or any phase of them. That the said defendants and each of them refused to reply to said communication, the plaintiffs filed this action on August 13, 1962.

VII

That there is a justiciable controversy between these plaintiffs and each of them and the said defendant PMA, defendant ILWU, defendant Ship Clerks Association, Local 34, ILWU, defendants, Trustees of the Welfare and Pension Funds, and the defendant Trustees of the Mechanization Fund and each of them concerning the terms of employment, dispatch, compensation, and the said collective bargaining agreement, and the rights and duties thereunder and arising from the breach of said contract as follows:

1. The plaintiffs and each of them contend that said bargaining agreement consists solely of the written documents aforesaid. On the contrary, the defendants and each of them contend that the bargaining agreement is subject to and is changed and added to by secret oral understandings between the defendants ILWU and PMA, and that it is not confined to the said written memorials constituting the said bargaining agreement, and that the defendants and each of them by their continued breaches have waived the said provisions of the contract, not only as to the matters which the plaintiffs and their individual employers relied upon as the disclosed and known collective bargaining agreement in each dispatch, but as to all matters so breached by said defendants' unlawful con-

duct. In this respect it is the plaintiffs' contention that the provisions of the contract requiring it to be changed only by writing, is a demand sufficient under the Labor Management Relations Act to require any change to be reduced to writing; and that the *Landrum Griffith Act* requires the entire collective bargaining agreement to be in writing so that it may be inspected and known by the employees including the plaintiffs, otherwise the provisions of Congress in said Act are meaningless.

2. The plaintiffs contend that each of them under said collective bargaining agreement as members of the permanent full time labor force of ship clerks available for dispatch from the hiring halls in the Port of San Francisco, were and are entitled to the so called status of "registration" as provided in the bargaining agreement and that a failure to enter their names on such "registration" list is a breach of the contract. The plaintiffs contend that discrimination against them as non-union ship clerks is a violation of the collective bargaining agreement. Plaintiffs contend that in making "registration" the defendant Committee must follow the priorities therefor in said agreement, and failure to do so is a breach of contract. Plaintiffs contend that the collective bargaining agreement requires an adequate number of "registered" ship clerks and the failure to do so is a breach of contract. Plaintiffs contend that upon demand of the employers to an increase in the number of ship clerks in the Port, a failure to increase such number is a violation of said contract. On the other hand the de-

fendants and each of them contend that there are two classes of employees: those whom the defendant Committee designates as "registered" and who constitute approximately one half of those in the permanent working force dispatched from the two hiring halls and who, by said mechanics and practices, receive special favors and preferences and who receive greater compensation whereas plaintiffs and others are subject to discrimination and are compensated at a lesser rate.

3. The plaintiffs contend that the current collective bargaining agreement is invalid insofar as it blankets in and perpetuates the "registration" in effect on 1 June 1951 made under the illegal provisions of the prior bargaining agreement that gave preference of employment and registration to union members, and said prior agreement provisions giving such priority to union membership was held invalid in the proceedings involving the defendant unions in 90 *NLRB* 102, 98 *NLRB* 284, and adjudicated by the Ninth Circuit, United States Court of Appeals, in 211 *Fed.* 2d 946 as void and illegal by reason of said preferences in employment and registry to said union membership. On the contrary, the defendants and each of them contend that said provisions in the current bargaining agreement granting preferences of employment and dispatch to those "registered" as of 1 June 1951, notwithstanding said adjudication, is valid and binding and "registrations" made under said illegal provisions of said prior agreement confined to said union membership, remain in full force and effect.

4. The plaintiffs contend that they and each of them are entitled to equal dispatch from said hiring halls under the valid terms of the bargaining agreement, without discrimination and equally under the terms of said agreement, and that the plaintiffs and each of them are and were during each of the years they have been and are full time members of the ship clerk working force, qualified and eligible under the said collective bargaining agreement as such ship clerks and they were and are dispatched thereunder and entitled by the specific terms of said agreement to dispatch without favoritism or discrimination in any hiring or dispatching or employment as such ship clerks. Plaintiffs contend that they and each of them are entitled to equal treatment without discrimination by reason of lack of union membership by the express provisions of the collective bargaining agreement. On the other hand, the defendants and each of them contend that said hiring halls and their facilities, and the provisions of the said collective bargaining agreement shall be and are used to grant preference to those whom the Committee arbitrarily enters on its list as "registered" irrespective of the requirement of preference of registration or the said agreement's provisions as to registration. In this respect the said defendant Joint Port Committee, ILWU, Local 34, and PMA contend that the agreement requires and authorizes them to dispatch ship clerks to jobs in the following order of preference for dispatch and employment:

(a) fully "registered" (Class A) ship clerks "registered on 1 June 1951 under the prior invalid

agreement granting preference of employment and dispatch to Local 34 full book members.

(b) fully "registered" (Class A) ship clerks "registered" since 1 June 1951, whether under the prior invalid agreement, or under the present collective bargaining agreement.

(c) other "registered" ship clerks (designated by the defendant Committee as "Class B").

(d) longshoremen, members of Local 10, ILWU, who have not on that date either been dispatched from the local longshore hiring hall, or who did not choose to be dispatched as longshoremen, and who are physically present in the clerks' hiring hall.

(e) such other persons, whether experienced or not, as the dispatcher elected as aforesaid, may, for reasons personal to the individual dispatcher, choose to dispatch as ship clerks, even though members of the full time working force of ship clerks, experienced as such, are available for dispatch in the said hiring hall, including plaintiffs.

5. Plaintiffs contend that they, as parties employing and compensating such agents, the defendants ILWU and defendant Local 34, ILWU, and as non-union ship clerks represented by the said defendants as the exclusive agent therefor under the *Taft-Hartley Act*, are entitled to be represented in such bargaining agreement negotiations and in the administration of the said collective bargaining agreement, without discrimination, and faithfully and equally, according

to the laws applicable to agents for compensation for hire, and according to the rules applicable to statutory collective bargaining agents, and that any abuse of said fiduciary position or relationship to obtain preference for any group or class of employees, or any planned, hostile, and purposeful discrimination against the plaintiffs as such principals under a contract for hire, or as either employees or non-union employees is improper and that the plaintiffs are entitled not only to their action at law for breach of this duty, but that equity will and must protect the plaintiffs in the construction and enforcement of said collective bargaining agreement from such abuse from such acts by said defendants. That when the PMA deals with said union in the making, changing, and in the administration of the said collective bargaining agreement, it well knows that said defendants Unions are both agents for hire compensated by the plaintiffs and the employees' exclusive collective bargaining agent and that the authority of such agents are limited accordingly, and any contract it makes it makes with such knowledge and any transaction it makes in the administration of such collective bargaining agreement, it does with such knowledge of said agents' limitation of authority. On the other hand, the defendants and each of them contend that their actions, though they grant unconscionable and unlawful preferences by said mechanics in dispatch and preference of jobs from said hiring hall, and in compensation for work performed thereunder, and their actions permit the selection and election of employee members of the said defendant Joint Commit-

tee and of hiring hall dispatchers by only approximately half of said working force, and prevent the use of arbitration or grievance machinery in all matters involving the plaintiffs, is nevertheless valid, and that the plaintiffs and none of them have any right in equity or in law to demand that the ILWU perform its duties as an agent for hire compensated by the plaintiffs or as the exclusive statutory collective bargaining agent under the *Taft-Hartley Act*, and these not affect the acts done by said agents under said fiduciary duty.

6. The plaintiffs contend that they are entitled to the contract pay and compensation as ship clerks, as all others working under the collective bargaining agreement, whether or not the said defendant Committee has made the actual act of entering the plaintiff's name as "registered" in said Committee's lists and in particular the right to be paid according to the bargaining agreement for eight hours in the event their employment in any one day is less than eight hours, as in the agreement provided; that the plaintiffs and each of them have the same benefits under the Welfare and Pension Fund as all other ship clerks and that the attempted retroactive change in said agreement is void and under federal law applicable to such funds such benefits cannot be restricted by any mechanics solely to those having full book membership in the Local 34 and all of the benefits including the wages generated on the plaintiff's individual employment and paid to the fund cannot be used exclusively for such union members; that the sums and

benefits accrued until the attempted change in February 1962 are benefits to which the plaintiffs and each of them are entitled by the express terms of the collective bargaining agreement; that the Mechanization Fund moneys are consideration for contracts made by and for benefit of plaintiffs and all other employees and moneys generated upon the employment of the plaintiffs and all other employees and that plaintiffs, together with all said employees, are entitled to their equitable interest in the said funds and to the benefits thereunder and that said benefits cannot be restricted in violation of Federal Statute solely to employee union members; that the plaintiffs and each of them are entitled to said vacation pay under said collective bargaining agreement, each of them having for the years involved worked the necessary hours under the joint collective bargaining agreement therefor. On the contrary, the defendants and each of them contend that the said plaintiffs solely because the said defendant Committee has not entered the plaintiffs' respective names on the list of "registered" ship clerks, but has only entered as "registered" clerks as an arbitrary part of the working force restricted to those who are full book union members, the plaintiffs are not entitled to any of the deferred contingent or other benefits to be paid under the collective bargaining agreement, but the PMA may and does keep for itself any funds from the individual employers for compensation of plaintiffs paid to it, including funds for deferred contingent and other benefits and vacation pay and Mechanization Fund payments and

the defendant Trustees of the Welfare and Pension Fund can and does properly refuse to pay for or provide any benefits to the plaintiffs under the terms of the collective bargaining contract because they are not union and "registered" members, and said defendant Trustees of said Fund contend that they properly use said funds only for union members to the exclusion of all other employees upon whose work said funds therefor are generated, earned and paid, including plaintiffs.

7. The plaintiffs contend that there should be no discrimination by reason of age between the ages of 40 and 64 as provided by 1961 *Statutes of California*, Chapter 1623. On the contrary the defendants and each of them contend that in "registration" and in making up the lists of regular working force of ship clerks dispatched with preference as to jobs and priority of dispatch from the hiring hall, said defendants not only can and do consider the age of such of the plaintiffs as are 50-64 years of age, and disqualify them solely for said reason of age, but nevertheless defendants take such other persons who are acceptable to said defendant Local 34 and accepted into full book membership of defendant Local 34, and not disqualify them for age, although some are between said ages of 50 and 64.

VIII

That the said Mechanization Agreement Supplement, has and does now reduce the amount of work available for those in the Maritime Industry in the

Port of San Francisco, and also as a result of said discriminatory practices against the plaintiffs in violation of the contract, and the said improper constructions of the said bargaining agreement, since the fall of 1961, the plaintiffs and each of them are now being dispatched only occasionally as such ship clerks from the said hiring halls.

And for a Third and Separate Cause of Action for Recovery Ancillary to, and a Part of the Action for Breach of Contract and for Declaratory Relief Upon the Collective Bargaining Agreement, the Plaintiffs Allege:

I

Plaintiffs reallege paragraphs I through XVIII of their first cause of action and paragraphs II through VIII of their second cause of action.

II

Plaintiffs are informed, believe and therefore allege that during the years the plaintiffs and each of them have been and now are employed as ship clerks under the collective bargaining agreement, the various shipping companies and stevedoring companies, members of the defendant PMA, in the Port of San Francisco employing the plaintiffs, have been and now are paying to the defendant PMA the entire compensation for such work of each of the plaintiffs in accordance with the said collective bargaining agreement, including all fringe benefits (deferred contingent compensation) that are payable under said con-

trust and are paid to all other ship clerks. That the said funds were and are paid to the said PMA, under said collective bargaining agreement, for the use and benefit of the individual plaintiffs. The PMA has only paid and disbursed portions to the plaintiffs as hereinabove alleged, or for the use of the plaintiffs. The plaintiffs believe and therefore allege that this money must be somewhere, and the plaintiffs seek to impress a trust upon said funds for their use and benefit under the terms and conditions and the purposes for which it was paid under said collective bargaining agreement. That a demand therefore has been made upon the various defendants for an accounting thereof and the said defendants have and do now refuse and neglect and fail to account for said funds or any part thereof or to use the same in accordance with the collective bargaining agreement for the said purposes for which it was paid, or to pay the plaintiffs' compensation according to the collective bargaining agreement for services performed by the plaintiffs under said collective bargaining agreement.

III

That within four years last past, immediately preceding the filing of this complaint, the plaintiffs and each of them by reason of the said breaches of the said contract and by reason of the failure to equally dispatch and employ the plaintiffs to equal jobs, under said bargaining agreement and according to the terms thereof, each plaintiff has been damaged in the sum of approximately $5,000 in each of said years, by rea-

son of the said loss of earnings therefrom. That the plaintiff prays leave to amend this complaint and set forth with certainty the amount of damage for each plaintiff when the same shall have been ascertained upon discovery.

And for a Fourth Cause of Action for Declaratory Relief, Plaintiffs Allege:

I

Reincorporate paragraphs I through XVIII of the first cause of action and paragraphs II through VI of the second cause of action.

II

That the use of "registration" of employees is novel to the Maritime Industry and was used originally to designate those employees in the Industry who were full time employees and dependent thereon for their livelihood from those who were only seasonal or part time employees in the Industry and dependent upon other employment during part of each year for their livelihood and is by the provisions of said current written agreement for said designation. That under the said prior contracts preference of employment, dispatch and registration were given to said union membership by reason of express provision therein. That on April 6, 1951, the examiner in a proceeding before the NLRB made an Interim Report holding that the execution of the said written collective bargaining agreement was in itself an unfair labor practice because of said union membership preference.

That immediately and as a result thereof the defendant PMA and defendant ILWU renegotiated the said basic contract providing for said priority of employment and dispatch to those "registered" as of June 1, 1951, under said illegal provision for priority of registration to Union members in order to defeat and avoid said determination of said NLRB. That on February 26, 1952, said NLRB on the basis of said proceedings involving said Interim Report, directly determined that the execution of said written collective bargaining agreement granting said preference to Union members was per se an unfair labor practice. That thereupon the defendant ILWU and the defendant PMA, to defeat and make void said determination of said NLRB renegotiated said clerks collective bargaining agreement and on April 4, 1952, executed said Master Agreement for Clerks and Checkers providing for said seniority date of 1 June, 1951. That thereafter on June 16, 1954, said NLRB proceedings were reviewed by the U.S. Court of Appeals, Ninth Circuit, and the said original collective bargaining agreement and its said provisions as to priority of registration, employment and dispatch for union members was adjudicated illegal and void. That for the purpose of frustrating and avoiding said two NLRB orders and said U.S. Court of Appeals, Ninth Circuit, decision of 211 Fed. 2d 946 of April 6, 1954, the said Master Agreement containing both said seniority date of June 1, 1951, and said "registration" provision requiring said joint consent (arbitrary veto by the union through its selected and directed employee member) and denial of all arbitration and grievance machinery

to "non-union non-registered" ship clerks have been not only continued but extended and kept in effect and was extended for a term of years and kept in effect well knowing its said purpose as late as June 20, 1962.

III

That although said collective bargaining agreement contains said express provisions against discrimination because of lack of union membership, the defendant PMA and defendant ILWU and defendant Local 34, ILWU, defendant Committee and defendant Trustees of said Funds at the time of commencing this action and do now at the time of this amendment use said designation of "registration" not only to defeat said NLRB orders and said adjudication by confining the "registered" ship clerks in the Port of San Francisco solely to such full book members of defendant Local 34, ILWU, and making the two co-extensive and synonymous terms and also to discriminate against the plaintiffs and all other full time members (not union members) of the working force of ship clerks in the Port of San Francisco in order to grant preference to said union members not only in dispatch and employment, but also to use their earnings in the Welfare and Pension Fund solely for full book members of said union and also to permit said defendant PMA to unlawfully divert to itself the vacation pay and parts of the Mechanization Fund and part of the hourly pay under the said "eight hour rule" of all non-union ship clerks in the Port of San Francisco in violation of said collective bargaining agreement.

That to effect this unlawful design and contract violations said defendants by their said actions and conspiracy have done the following:

1) Maintained on the "registered" list of said defendant Committee all union members "registered" under said prior illegal contract provisions.

2) Kept the "registered" number of ship clerks in the Port of San Francisco at said artificially low number to grant said preference of employment and dispatch and confine benefits under said jointly trusteed plans to said union members.

3) Breached the said written contract provisions as to said welfare and pension benefits from 1958 to February 1962, when said defendant PMA and defendant ILWU purported to amend said agreement retroactively to June 1, 1961, to confine all benefits to solely said union members by limiting it to "registered" ship clerks.

4) Admit to "registration", ship clerks in said Port only those who are full book members in said defendant Local 34, ILWU, and said defendant Union by its said employer member limited its "consent" and vetoed all others such "registration", and not followed the priority of registration nor adequate number of ship clerks in violation of said agreement.

5) Said defendant Local 34, ILWU, collected compensation monthly as a "permit" to work under said collective bargaining agreement from all non-union ship clerks both for itself and defendant ILWU including monthly charges itemized for "representation

and caucuses" in connection with said collective bargaining agreement which said monthly compensation was identical in amount with dues and assessments of its full book members.

6) Confine election of the Union official acting as said "employee member" of defendant Committee solely to its said membership including said supervisory employees and retired union members not dispatched from day to day from said hall and exclude plaintiffs and all other full time members of said ship clerk working force in said Port who were not accepted into Union full book membership from such vote.

7) Confine election of hiring hall dispatchers who give out actual jobs, to vote of such full book union members including supervisory employees and retired union members who are not dispatched from day to day from said hiring halls and exclude plaintiffs and all other members of the ship clerks' full time working force not admitted to such membership from such vote.

8) Exclude from all mechanics of grievance and from arbitration under said collective bargaining agreement all matters by non-Union "non-registered" ship clerks, including plaintiffs, so their only remedy is by judicial proceedings and when plaintiffs seek this judicial determination, to discriminate even further against plaintiffs therefor.

9) Dispatch to all jobs in preference, and demand employers retain on employment as priority, all full

book Union members who choose to work and thus give priority not only of dispatch but employment to said Union members including jobs with higher pay, overtime and/or penalty pay.

10) Permit and assist defendant PMA to discriminate between said Union and non-Union members, not only in such employment by its members, but in disbursing compensation for work paid PMA by individual employers and to permit PMA to profit by its said discrimination and contract breaches and PMA does the following:

a) Although plaintiffs and other non-Union ship clerk members of the said permanent working force do the same work, under the same contract provisions therefor, it pays plaintiffs and other said non-Union ship clerks for actual hours (and not under said "eight hour rule") and no fringe benefits, though money therefor is paid PMA by individual employers to pay said employees according to the terms of said collective bargaining agreement.

b) Pays said Union members as provided in said agreement.

c) That non-Union members (when dispatched, without the said current discrimination against plaintiffs for seeking judicial remedy, as are other non-Union ship clerks) earn between $4,000 and $5,000 per year working ordinary business days during ordinary business hours (not overtime, or evenings or where there is additional or higher

pay) and receive no part of the vacation pay, welfare and pension benefits nor Mechanization Fund payments. On the other hand said Union members receive about $5,000 per year more, plus two weeks at straight pay, or more, as vacation pay, plus all the Welfare and Pension Fund benefits and some unknown 410 of the said Industry receive from PMA payments for Mechanization Fund benefits, though some 1,390 more are entitled thereto and said Union members will as beneficiaries receive said multi-million dollar fund, unless judicial remedy therefor intervenes.

IV

That there is a justiciable controversy between the parties hereto in which plaintiffs contend there is a clear violation of the terms of said collective bargaining agreement:

1) Plaintiffs contend the provisions of said agreement as to non-discrimination both in the portion as to Union and non-Union and the portion as to dispatch of those qualified and eligible under said agreement is valid and takes precedence over any provisions as to "registration" when so used by defendants, as to "mutual consent" thereto which is illegal and as to the seniority date of 1 June 1951 (which is illegal), and denial of grievance machinery to "non-registered non-union" ship clerks is invalid.

2) That the term "registration" has by said joint acts of said defendants become co-extensive with and synonymous with full book union membership in said

defendant Local 34, ILWU, and is thus invalid and void and has been and is now used as an instrument of discrimination in violation of said collective bargaining agreement.

On the other hand said defendant PMA, defendant ILWU, defendant ILWU, Local 34, defendant Committee and defendant Trustees contend that the full time working force of ship clerks is confined solely to "registered" ship clerks, co-extensive with said union full book membership, and all others are permitted to and do work solely at the sufferance of said defendant Unions, upon payment of said monthly "permit" payment, and all priority of dispatch and employment are reserved to and for said full book Union members by designation as "registered" that by the said mechanics all fringe benefits (deferred contingent compensation) can be and are denied non-Union ship clerks of the full time working force by use of said designation of "registration" and said compensation for services can be and is used in part solely for said full book union members or taken by PMA from the purpose for which it was paid by individual employers, under said collective bargaining agreement, to pay plaintiffs and other non-union ship clerk employees. Said defendants contend that no matter how long any ship clerk works or what skill or ability he has, or how often he is available for dispatch or however much he works as such, that unless and until the defendant Union, Local 34, ILWU, gives its approval necessary for "registration" (and which is confined to its full book members) such ship clerk

is not and cannot be a member of said "full time working force"; and that said defendant Union, Local 34, ILWU, and consequently the defendant Committee, cannot enter such ship clerk's name as "registered" nor may such ship clerk receive any benefits from either said Trustees' Funds nor need the defendant PMA pay such ship clerk from funds paid it by the individual employer under said agreement to pay such ship clerk, but may retain all wages under said "eight hour rule", all vacation pay, and such part of said Mechanization Fund payment generated on said ship clerks' wages as it, the said PMA, chooses not to disburse.

V

That said defendants cannot misuse the provisions of "registration" of ship clerks in the Port of San Francisco, in said collective bargaining agreement, as a subterfuge or a means to discriminate against all non-union ship clerks in said Port, including plaintiffs, and to defeat, frustrate and avoid said NLRB orders and decisions, the adjudication of said U.S. Court of Appeals, Ninth Circuit, or said Federal Statutes involving interstate commerce. That there must be an adjudication in these proceedings as to such misuse of the said "registration" provisions and breach thereof by said defendants and the rights, duties and liabilities of the plaintiffs and said defendants thereunder and the legality or illegality of said agreement's provisions and of said equitable interests of plaintiffs in said moneys and Funds, it being said

defendants' contentions that by breaches of said collective bargaining agreement there is a waiver thereof (prescriptive right of defendants to continue said breaches without judicial remedy of plaintiffs therefor).

Wherefore the plaintiffs Fred A. Alexander, Louis P. Camarota, George Cathro, Albert S. Dimond, Lewis Freeman, Frank Marani, Ray C. Marvin, James Newell and Earl D. Petersen, and each of them, pray judgment against the defendants as follows:

1. That the court direct and order in the nature of a writ of mandate the defendant Joint Clerks Labor Relations Committee to properly register the plaintiffs and each of them as ship clerks and enter each plaintiff's name as fully registered under the said collective bargaining agreement (Class A) as of the proper date therefor for each plaintiff.

2. That the plaintiffs have declaratory relief under said complaint, second cause of action, against the defendants PMA, ILWU, Joint Clerks Labor Relations Committee, Port of San Francisco, H. J. Bodine, L. B. Thomas, William Chester, K. F. Saysette, J. A. Robertson and Hubert Brown as Trustees of ILWU-PMA Welfare & Pension Funds; Harry Bridges, H. J. Bodine, L. B. Thomas, K. F. Saysette, R. J. Pfeiffer and Capt. C. Pryor, as Trustees of ILWU-PMA Mechanization Fund as follows:

(a) A determination that the collective bargaining agreement consists only of the writings executed by the bargaining representatives, in writing, and

does not contain any oral provisions nor secret understandings nor waivers arising from defendant's breaches thereof or failure of any defendant to observe said agreement's terms.

(b) That the plaintiffs and each of them as members of the full time working force under said collective bargaining agreement working in the Port of San Francisco, have been and are entitled to equal dispatch and equal job preference with all other members of the working force without preference or priority as to date of employment or registration, including those registered on June 1, 1951, under said prior illegal contract provisions, and that each plaintiff has an equal right to vote for the employee representative of the defendant Committee, and for equal right to vote in the election of the hiring hall dispatchers.

(c) That the plaintiffs and each of them are entitled to all of the compensation provided for employees under the collective bargaining agreement, and not for a lesser sum; that each is entitled to compensation under the said "eight hour rule", and entitled to the fringe benefits (deferred contingent compensation) including vacation pay, for welfare and pension benefits under the said collective bargaining agreement, including insurance and hospital, medical and surgical contract coverage for themselves and their dependents, dental care for their dependents, and that plaintiffs are entitled to be paid on the same basis as all of the members of the working force, and to receive the

benefits under the Mechanization Plan Fund as other members of the working force working who were employed in the Industry in 1958.

3. That the plaintiffs and each of them are entitled to an accounting from PMA, the defendant Trustees of the ILWU-PMA Welfare & Pension Funds, and the defendant Trustees of the ILWU-PMA Mechanization Fund; that there be a determination as to what funds are properly in the Welfare Fund to which the plaintiffs have an equitable interest; that there be a determination as to what funds are properly in said Mechanization Fund or should be paid to or ordered paid to the Trustees of the Mechanization Fund, and what equitable interests the plaintiffs have therein as to each portion held by PMA or said Trustees and that the plaintiffs are entitled to benefits from said fund should they not be employed in any one week sufficient to earn 35 hour straight time pay as in the Mechanization Agreement Supplement provided and for vested interest upon death or retirement as therein provided; that there be a determination as to what portions of the compensations to the plaintiffs has been paid by the various employers of the Shipowners and Stevedoring Companies and that are held by the defendants, for which no benefits have accrued to the plaintiffs therefrom, and that a trust be imposed thereon and that the plaintiffs and each of them have judgment for such unpaid compensation, except as to the funds as are held under the Trusts and that as to them there be a declaration of rights and adjudication of the sums due the plain-

tiffs by such trustee under said collective bargaining agreement. That the plaintiffs have judgment for such compensation for which no benefit has been received, against the defendant PMA, of such funds as it holds or has held for the plaintiffs, together with 7% interest thereon until judgment, and against the Trustees of the various Funds for such benefits as have accrued or in the alternative for such compensation for the plaintiffs for which the time for the benefits have passed, together with 7% interest to the date of judgment.

4. That the plaintiffs and each of them have judgment for damages for breach of contract in the sum of $20,000 each (or such other sum as may be alleged by amendment to the complaint after discovery) against the defendants PMA, ILWU, Ship Clerks Association, Local 34, ILWU, and against said Joint Clerks Labor Relations Committee, an unincorporated association, and in addition, a judgment against such defendants and each of them as damages accrued since the filing of the complaint to the date of judgment for loss of wages or earnings by reason of breach of the collective bargaining agreement.

5. For costs of suit herein incurred.

6. For such other and further or other or further relief, decrees, judgments and/or orders as shall be meet in the premises.

Dated: April 12, 1963

Howard B. Crittenden, Jr.,
Attorney for Plaintiffs.

ORDER OF DISMISSAL

This matter having been duly called for hearing on this date pursuant to the order of this Court on March 28, 1968, the Court having considered the pertinent facts, records and files, all parties having been heard or, given ample notice and opportunity for hearing, having failed to appear, and good cause appearing therefor,

IT IS HEREBY ORDERED that this proceeding be and it is hereby dismissed.

Dated: June 5, 1968.

STANLEY WEIGEL

Judge

Subject Index

	Page
The question presented	1
Reasons why the writ should not be granted	2
The Court of Appeals correctly held that the order dismissing the complaint for want of prosecution was not an abuse of discretion	2
The facts	2
The law	5
Conclusion	11

Table of Authorities Cited

Cases

	Pages
Agnew v. Mosely, 330 F.2d 868 (9 Cir. 1964)	8
Alexander v. Pacific Maritime Association, 434 F.2d 281 (9 Cir. 1970)	2, 3, 7
Beaufort Concrete Company v. Atlantic States Construction Co., 384 U.S. 1004 (1966)	6
Coleman v. Superior Court, 135 Cal.App. 74, 26 P.2d 673 (Ct. App. 1934)	9
Demeulemeere v. Rockwell Manufacturing Co., 312 F.2d 200 (2 Cir. 1962)	7
Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	4
Edmond v. Moore-McCormack Lines, 253 F.2d 143 (2 Cir. 1958)	7
Esteva v. House of Seagram, Inc., 314 F.2d 827 (7 Cir. 1963)	8

Pages

Fitzsimmons v. Gilpin, 368 F.2d 561 (9 Cir. 1966) 8
Food Basket, Inc. v. Albertson's, Inc., 416 F.2d 937 (10 Cir. 1969) 8

Gorsuch v. Provident Security Life Insurance Co., 392 F.2d 200 (9 Cir. 1968) 8
Grunewald v. Missouri Pacific Railroad Company, 331 F.2d 983 (8 Cir. 1964) 7

Hyler v. Reynolds Metal Co., 434 F.2d 1064 (5 Cir. 1970) 7

Kelley v. United States, 338 F.2d 328 (1 Cir. 1964) 8
Kenney v. California Tanker Co., 381 F.2d 775 (3 Cir. 1967), cert. den. 390 U.S. 904 7
Kyptok Co. v. Haussmann & Co., 217 Fed. 267 (E.D. Pa. 1914) 8

Link v. Wabash Railroad Company, 370 U.S. 626 (1962) 5, 6, 10

Maiorani v. Kawasaki Kisen K.K., Kobe, 425 F.2d 1162 (2 Cir. 1970), cert. den. 399 U.S. 910 (1970) 7
Montgomery v. Commissioner of Internal Revenue, 369 F.2d 917 (9 Cir. 1966) 8
Morris v. Florida, 398 U.S. 850 (1968) 6

Provenza v. H. & W. Wrecking Co., 424 F.2d 629 (5 Cir. 1970) 7

Santana v. United States, 385 U.S. 849 (1966) 6
Shaefer v. Warehouse Employees Union Local No. 730, 408 F.2d 204 (D.C. Cir. 1969), cert. den. 395 U.S. 934 (1969) 8
Shotkin v. Westinghouse Electric & Manufacturing Co., 169 F.2d 825 (10 Cir. 1948) 8
States Steamship Co. v. Philippine Airlines Co. and Qantas Airways, 426 F.2d 803 (9 Cir. 1970) 7

Theodoropoulos v. Thompson-Starrett Co., 418 F.2d 350 (2 Cir. 1969) 7
Torino v. Texaco Inc., 378 F.2d 268 (3 Cir. 1967) 7

Pages

United States v. Charles Kruz Co., 396 F.2d 1013 (C.C.P.A. 1968) 8

Zoellner v. Newmann, 214 N.Y.Supp.2d 31, 13 A.D.2d 723 (App. Div. 1961) 10

Codes

California Code of Civil Procedure, Section 1288 4

Rules

Rules of Practice of the United States District Court:

Rule 41(b) 5, 6

Rule 11 ..... 5, 6

Federal Rules of Civil Procedure (18 U.S.C.):

Rule 41(b) 5

Rule 60(b) 4, 10

Statutes

United States Arbitration Act (9 U.S.C. §9) 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1304

FRED A. ALEXANDER, et al.,
Petitioners,

vs.

PACIFIC MARITIME ASSOCIATION,
a non-profit corporation, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE QUESTION PRESENTED

While the petition argues the merits of petitioners' claims, we submit that the only question is whether an issue of sufficient importance to warrant review by this Court is presented by the determination of the Court of Appeals that the District Court did not abuse its discretion in dismissing the proceeding for want of prosecution.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The petition fails to assign any of the reasons specified in Rule 19 of the Rules of this Court, which would justify the granting of the writ. It does not suggest that there is a conflict between the decision below and the decision of any other Court of Appeals or that the decision below conflicts with any decision of this Court. Indeed, a review of the relevant decisions demonstrates that the decision below is in perfect harmony with the already established case law in both this Court and the Courts of Appeal.

THE COURT OF APPEALS CORRECTLY HELD THAT THE ORDER DISMISSING THE COMPLAINT FOR WANT OF PROSECUTION WAS NOT AN ABUSE OF DISCRETION

The Facts

The Court of Appeals said that "[t]aking a long hard look at the entire record, therefore, we cannot say that the district judge abused his discretion in dismissing the complaint" (App. to Pet. for Cert., fifth unnumbered page; *Alexander v. Pacific Maritime Association*, 434 F.2d 281, 284 [9 Cir. 1970]).

The "long hard look at the entire record" revealed that petitioners' amended complaint, filed in April of 1962, was one for breaches of a collective bargaining contract which contained grievance-arbitration procedures to remedy such breaches;[1] that, pursuant to the

---

[1]The original complaint filed in 1962 did not state a claim for breach of contract (*Alexander v. Pacific Maritime Association*, 314 F.2d 699, 694 [9 Cir. 1963]).

principles laid down in this Court's decisions, the District Court, on July 19, 1963, stayed the proceedings "pending disposition of the case on arbitration"; that petitioners delayed the filing of their grievances for ten and a half months thereafter, i.e., until June 5, 1964; that the local committee ruled promptly on their grievances, i.e., by July 22, 1964; that instead of pursuing their grievances to the next stage, petitioners waited another eight and a half months, i.e., until April 9, 1965, and then filed in the District Court a motion to modify the stay order; that when that motion was denied on April 26, 1965, because the grievance procedure had been only partially completed by petitioners, petitioners went back to the grievance machinery where the Coast Committee acted promptly and, on June 4, 1965, ruled on the grievances and advised petitioners of their right under the contract to appeal to the Coast Arbitrator; that this set the matter up for the last stage of the grievance machinery, i.e., an appeal to the Coast Arbitrator; that while petitioners did appeal to the Coast Arbitrator, "they failed to proceed with the arbitration procedures of the contract by refusing to agree to a clarification of issues" (App. to Pet. for Cert., fifth unnumbered page; *Alexander v. Pacific Maritime Association*, 434 F.2d at 282 [9 Cir. 1970]); that instead of proceeding expeditiously under the contract, petitioners once again went back to the District Court in an attempt to bypass the arbitrator; that the District Court once again refused to permit this to be done; that petitioners finally proceeded before the Coast Arbitrator, who rendered his decision, adverse

to their claims, on June 30, 1967; that, with the arbitration proceedings completed, petitioners were free to proceed to court, to seek to vacate and modify the Arbitrator's award; that they permitted the statutory time within which they could have done so (9 U.S.C. §12; *cf.*, California Code of Civil Procedure, §1288) to expire without taking any action at all; that they did nothing whatsoever until the District Court *sua sponte*, and pursuant to its local rules, issued an order to show cause why the action should not be dismissed for failure to prosecute; that thereupon, ten and a half months after the arbitrator had rendered his award, petitioners filed a motion to compel respondents to file answers and to answer interrogatories, but no motion to vacate or set aside the arbitration award; that respondents thereupon moved for a dismissal for failure to prosecute, or in the alternative for an order confirming the award, pursuant to both the United States Arbitration Act (9 U.S.C. §9) and the California Arbitration Act (California Code of Civil Procedure §1288) and the federal common law in this area of labor relations, *Board Box Co. v. Courtney*, 368 U.S. 502, 507 (1962); that upon the hearing of the order to show cause, good cause appeared for the dismissal and that the District Court did not abuse its discretion in ordering the dismissal.[2]

Petitioners did not, after the dismissal order, seek to avail themselves of the provisions of Rule 60(b), Fed. Rules Civ. Proc., 18 U.S.C., which authorizes

---

[2]Since the District Court dismissed the action, it was not called upon to rule upon respondents' alternative request to confirm the award.

the reopening of cases in which final orders have been individually entered.

The law

Rule 41(b), Fed. Rules Civ. Proc., 18 U.S.C., provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, the defendant may move for dismissal of an action or of any claim against him."

Implementing Rule 41(b), Rule 11 of the Rules of Practice of the United States District Court for the Northern District of California provides, in pertinent part, that:

> "Quarterly, the Calendar Judge shall call a convenient number of cases from the General Civil File wherein no Memorandum to Set has been filed, bring the oldest cases in chronological order according to the filing date thereof, upon an order to show cause, by affidavit or certificate of counsel filed with the Calendar Judge, why such cases should not be dismissed for lack of prosecution.
>
> The Calendar Judge may (1) dismiss such cases for lack of prosecution; . . ."[9]

This Court considered the genesis of Rule 41(b) in *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962), where it said:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of

---

[9]Rule 11's predecessor, Rule 16, was referred to with evident approval by this Court in *Link v. Wabash Railroad Co.*, 370 U.S. 626 at 631, n. 7 (1962), as one of those rules established by the District Courts on their own initiative to cope with "calendar congestion [where it] has become a severe problem."

> his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law, e.g., 3 Blackstone, Commentaries (1768), 295-296, and dismissals for want of prosecution of bills in equity, e.g., id., at 451." (at 629-630).

Link furthermore held that, despite the literal language of Rule 41(b), the District Court had the inherent power, *sua sponte*, to order a dismissal for want of prosecution—although that question is not really presented by this record because respondents had moved, pursuant to Rule 41(b), to dismiss the complaint (or in the alternative to confirm the arbitration award).

Finally, *Link* established that an order of dismissal for want of prosecution is not to be disturbed on appeal if it is "within the permissible range of the [trial] court's discretion" (370 U.S. at 633); or, put another way, such order is to be sustained unless it "amounted to an abuse of discretion" *(ibid.)*.

By its subsequent denials of certiorari in cases raising related issues, this Court has apparently regarded these principles as no longer open to question. *Cf. Morris v. Florida*, 398 U.S. 950 (1968); *Santana v. United States*, 385 U.S. 849 (1966); *Beaufort Concrete Company v. Atlantic States Construction Co.*, 384 U.S. 1004 (1966).

The Courts of Appeals have consistently and without deviation followed the principles laid down in *Link*:

Second Circuit:

Maiorani v. Kawasaki Kisen K.K., Kobe, 425 F.2d 1132 (2 Cir. 1970); cert. den. 399 U.S. 910 (1970);

Theodoropoulos v. Thompson-Starrett Co., 418 F.2d 320 (2 Cir. 1969);

Demaleneere v. Rockwell Manufacturing Co., 312 F.2d 209 (2 Cir. 1962);

Edmond v. Moore-McCormack Lines, 253 F.2d 143 (2 Cir. 1958).

Third Circuit:

Kenney v. California Tanker Co., 381 F.2d 775 (3 Cir. 1967); cert. den. 390 U.S. 904;

Torino v. Transo Inc., 378 F.2d 268 (3 Cir. 1967).

Fifth Circuit:

Hyler v. Reynolds Metal Co., 434 F.2d 1064 (5 Cir. 1970);

Provenza v. H. & W. Wrecking Co., 424 F.2d 629 (5 Cir. 1970).

Eighth Circuit:

Grunewald v. Missouri Pacific Railroad Company, 331 F.2d 983 (8 Cir. 1964).

Ninth Circuit:

Alexander v. Pacific Maritime Association, 434 F.2d 281 (9 Cir. 1970);

States Steamship Co. v. Philippine Airlines Co. and Qantas Airways, 426 F.2d 603 (9 Cir. 1970);

Gorsuch v. Provident Security Life Insurance Co., 332 F.2d 209 (9 Cir. 1963);

Fitzsimmons v. Gilpin, 309 F.2d 301 (9 Cir. 1962);

Montgomery v. Commissioner of Internal Revenue, 269 F.2d 917 (9 Cir. 1959);

Aguew v. Moody, 330 F.2d 668 (9 Cir. 1964).

Tenth Circuit:

Food Basket, Inc. v. Albertson's, Inc., 416 F.2d 937 (10 Cir. 1969);

Shotkin v. Westinghouse Electric & Manufacturing Co., 169 F.2d 925 (10 Cir. 1948).

D.C. Circuit:

Sharfer v. Warehouse Employees Union Local No. 730, 408 F.2d 204 (DC Cir. 1969); cert. den. 395 U.S. 934 (1969).

See, additionally, *United States v. Charles Kenz Co.*, 396 F.2d 1013 (CCPA. 1968); and *cf.*, *Kelley v. United States*, 338 F.2d 328, 329 (1 Cir. 1964) and *Estera v. House of Seagram, Inc.*, 314 F.2d 827, 830 (3 Cir. 1963).

Petitioners themselves concede that "a court has inherent power to dismiss an action for want of diligence in its prosecution" and that such a dismissal is addressed "to the sound discretion of the trial court" (Pet. for Cert., 11).

The three cases relied upon to avoid the application of these universally recognized and salutary rules to this case do not sustain petitioners' position.

In *Kyptok Co. v. Hausmann & Co.*, 217 F. 267 (E.D. Pa. 1914), plaintiff brought suit against a

dealer for infringement of a patent; plaintiff had also sued the dealer's manufacturer in another court, where plaintiff was enjoined from suing the manufacturer's customers, of which the defendant in the pending case was one. After the injunction was reversed by an appeals court, the plaintiff did not immediately take further steps in his action against the dealer but waited until he was awarded a preliminary injunction against the manufacturer on May 25, 1914. Thereafter, on June 18, 1914, less than one month later, he applied for a preliminary injunction against the dealer. The dealer responded by a motion to dismiss for want of prosecution, which the court refused to grant. It seems clear that this act of discretion of a district court taken 57 years ago under different circumstances and different rules is not any basis for reviewing here the Court of Appeals' affirmance of the district court's act of discretion in the instant case.

Coleman v. Superior Court, 135 Cal.App. 74, 26 Pac.2d 673 (Ct. App. 1934), also is inapplicable. That case involved the effective date of an amendment to a state statute requiring dismissal under certain circumstances. The court explicitly stated: "That portion of the section which authorized the court to dismiss an action at its discretion is not involved herein . . ." (135 Cal.App. at 76, 26 Pac.2d at 674) and that "irrespective of the sections of the Code involved . . . , the rule [is] reaffirmed that courts have inherent power to dismiss actions where there has been unreasonable delay in bringing the same to trial." (135 Cal.App. at 77, 26 Pac.2d at 674).

Zeellner v. Neumann, 214 N.Y.Supp.2d 31, 13 A.D. 2d 723 (App. Div. 1961), is of no more significance here than the two cases discussed above. There, the appellate court stated:

> "The day of the trial, pending the return of the commission on the written interrogatories directed to the witness in Holland, prevented the trial of this cause. It would appear neither party for a substantial period thereafter was aware of the return of the commission." (214 N.Y.Supp. 2d at 32, 13 A.D.2d at 723).

On this ground, the court reversed the dismissal for failure to prosecute. The significant difference is clear. Appellants in the present case cannot, and do not, claim that they were unaware of the arbitrator's award.

Thus it appears that none of these three cases in any way undermines the controlling effect of the more recent decisions of this Court or the Courts of Appeals cited above.

Finally, although petitioners had available to them the "escape hatch" (*Link v. Wabash Railroad Co.*, 370 U.S. 626 at 632 [1962]) provided for by Rule 60(b), Fed. Rules Civ. Proc., 18 U.S.C., they never sought to avail themselves of that corrective remedy. The time to do so is now long past.

CONCLUSION

The Court of Appeals was manifestly correct in holding that the District Court had not abused its discretion in dismissing the proceeding for want of prosecution. Its decision accords with the decisions of this Court and of other Courts of Appeals which have considered the question.

The petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
March 1, 1971.

Respectfully submitted,
NORMAN LEONARD,
RICHARD ERNST,
Attorneys for Respondents.

GLADSTEIN, LEONARD, PATSEY & ANDERSON,
ERNST & DANIELS,
Of Counsel.